Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN M. CHAIT
Counsel of Record

STEVEN M. CHAIT & ASSOCIATES, P.C.
4309 Westover Court
West Bloomfield, Michigan 48323
(810) 855-8827

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. WHETHER THE FEDERAL AVIATION ACT AND THE FEDERAL AVIATION REGULATIONS PROMULGATED THEREUNDER PROVIDE A PERVASIVE UNIFORM SYSTEM OF CONTROL OVER AIRCRAFT OPERATIONS ABOVE OR UPON OPEN WATER SUCH THAT A CITY ORDINANCE WHICH PURPORTS TO PROHIBIT AIRCRAFT OPERATIONS ABOVE OR UPON OPEN WATER IS PREEMPTED BY FEDERAL LAW?

II. WHETHER A DISCRIMINATORY CITY ORDINANCE VIOLATES A RIPARIAN PROPERTY OWNER/AIRMAN'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WHERE THE ORDINANCE IS EXCLUSIONARY, PROHIBITS A REASONABLE USE OF THE WATER, IS ARBITRARY, CAPRICIOUS AND NOT REASONABLY RELATED TO A GOVERNMENT INTEREST?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Gustafson, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on February 27, 1996, and the subsequent denial of the Motion for Reconsideration and Suggestion for Rehearing En Banc on April 3, 1996.

OPINIONS BELOW

The United States District Court for the Eastern District of Michigan, Judge Paul V. Gadola, found in a strong, well written and researched opinion, that the Federal Aviation Act and the regulations promulgated thereunder demonstrate Congressional intent to preempt local regulations governing flight operations, and relied upon this Honorable Court's opinion in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), along with an entire progeny of subsequent caselaw following *Burbank*.

The District court granted riparian Property owner and Seaplane Pilot Robert Gustafson's Motion for Summary Judgment and Plaintiff's Motion for Declaratory Judgment and a Permanent Injunction, preventing the defendant City and its Officers from enforcing the City's local ordinances which totally **prohibited** the operation of any type of aircraft within 500 feet of the surface of the

lake[1], or the operation of seaplanes upon the surface of Lake Angelus.

The District Court also granted the defendant City's Cross Motion for Summary Judgment as to the Plaintiff's claim under 42 USC 1983 for violation of his constitutional rights. The opinion of the District Court was issued on October 22, 1993. (See App. 2)

On February 27, 1996, the United States Court of Appeals for the Sixth Circuit **reversed** in part the holding of the District Court, and ruled that the City of Lake Angelus Ordinances **prohibiting** the operation of Seaplanes was **not** Federally Preempted; the Circuit Court also **Affirmed** in part the decision of the District Court holding that Plaintiff Robert Gustafson had not been deprived of his right to due process and Equal Protection. (App. 1)

On April 3, 1996, the United States Court of Appeals for the Sixth Circuit denied Plaintiff Robert Gustafson's Motion for Reconsideration and Suggestion for En Banc Review. (App. 3)

However, on April 15, 1996, the Circuit Court **Granted** Plaintiff Robert Gustafson's Motion for Stay of the Mandate for 60 days, to enable Robert Gustafson to perfect this timely Petition for Writ of Certiorari to this Honorable Court. (App. 4)

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[1] Notwithstanding the fact that Lake Angelus lies only 4.5 miles from Oakland-Pontiac Airport, the second busiest airport in the State of Michigan.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was Filed on February 27, 1996, and Reconsideration was denied on April 3, 1996. This Honorable Court's jurisdiction to consider this petition from the final order of the United States Court of Appeals is invoked pursuant to 28 USC 2101 et seq.

CONSTITUTIONAL PROVISIONS

(a) Article VI of the United States Constitution declares that Federal Law:

> . . . [S]hall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

STATEMENT OF THE CASE

Plaintiff Robert Gustafson, a licensed seaplane pilot, and owner of riparian property on Lake Angelus, filed this action against defendants City of Lake Angelus, its Mayor, Donald Althoff, and Chief of Police, Michael Stefani, alleging violations of Federal statutory and constitutional rights. Plaintiff sought from the District Court below and **was granted** declaratory and injunctive relief against the enforcement of City ordinances which **prohibit,** not merely attempt to regulate, the operation of **any** type of aircraft at or below 500 feet and/or upon the surface of Lake Angelus. (App. 2) **Jurisdiction in the**

District Court was based upon the Federal Question of Preemption of Local ordinances by the Federal Aviation Regulations and Federal Statutes.

The relevant portions of the local municipal ordinances complained of are set forth in the Opinion of the Circuit Court at pages 3 and 4 (App. 1) and in the opinion of the District Court. (App. 2)

Additionally, Robert Gustafson sought an award of attorney fees pursuant to 42 USC 1988 for the violation of his constitutional rights to due process and equal protection caused by the enforcement of the ordinances. The District Court denied an award of attorney fees.

Petitioner Robert Gustafson adopts the statement of facts contained within the Opinion of the United States Court of Appeals, which appropriately summarizes the parties and procedural history of the case. (App. 1)

In addition, the following record factual evidence pertaining to the challenged City Ordinances was presented to the courts below.

A. The record demonstrates that there was absolutely no objective inquiry undertaken by the City which would support the conclusion that the Ordinances were reasonably related to the achievement of the stated objectives.

For example, Mayor Donald Althoff testified that he was not aware of any consultants or experts on behalf of the City who had expressed any opinions regarding the safety of operating seaplanes at Lake Angelus, and he did

not have any direct knowledge as to whether any consultants or experts had ever been retained or had expressed any opinions with regard to the noise levels of seaplane operations. The Mayor had no knowledge as to whether the City had ever studied the **Safety History** of seaplanes operating around boats. (App. 5 at 68-69)

Police Chief Michael Stefani also testified at deposition that he was similarly not aware of any investigation or study with regard to the **safety record** of seaplanes on inland lakes, nor any studies comparing the safety record of seaplane operations with that of boats on the lake. (App. 5 at 68)

Though the ordinances were ostensibly enacted to promote the **health, welfare and safety of the citizens**, Police Chief Stefani knows of no such criteria by which anyone had determined that a seaplane is more or less safe than the power boats that are currently permitted on Lake Angelus. While Chief Stefani opines that "it's just common sense," he knows of no data to support the proposition that there are any safety related reasons for the 500 foot altitude or surface **prohibitions** of seaplanes at Lake Angelus. (App. 5 at 68)

B. The City ordinances are in fact unrelated to any actual safety or noise concerns.

In fact, the *only objective analysis* undertaken by the City's request was a review of the lake by James Greshel, Administrator, Safety and Services Division of the Michigan Bureau of Aeronautics. (App. 9) **Mr. Greshel saw no factor which would prevent aircraft from safely taking off or landing on Lake Angelus.**

Mr. Greshel stated: **"There is no significant aviation safety or airspace basis to exclude seaplanes from (the lake) . . . "**. (App. 9)

Mr. Greshel also reported that Federal Aviation Administration (FAA) personnel at the nearby Oakland-Pontiac Airport Air Traffic Control Tower have no problem coordinating seaplanes using the lakes with air traffic using the Oakland-Pontiac Airport. Lake Angelus underlies the Airport Traffic Area and the Control Zone established for the Oakland-Pontiac Air Traffic Control Tower. Oakland-Pontiac Airport is the second busiest airport within the State of Michigan, and aircraft both departing and arriving at Oakland-Pontiac and nearby lakes have operated for years in and around the airspace of the City. See Affidavit of Federal Aviation Administration Tower Manager Kyle Kiefling (App. 8) Mr. Kiefling's Affidavit also sets forth the need for the use of the surface of Lake Angelus, along with the fact that seaplanes have in the past and will continue to use the surface of the water.

In addition to the frequent General Aviation air traffic which regularly operates at relatively low altitude over the City of Lake Angelus, including many jet aircraft such as DC-9 and Boeing 727 aircraft, the City of Lake Angelus ordinances permit many uses within the City and on the Lake which emit much higher volumes of noise than does the 85 horsepower Piper J-3 Cub which Petitioner Robert Gustafson landed upon Lake Angelus in August, 1991.

C. Clear and Obvious Conflict Between Local Ordinance and Federal Law.

Prior to the entry of the District Court's Permanent Injunction below, a **serious conflict between the Federal Aviation Regulations and the local ordinances** was in existence, in which even landplane pilots would have to decide whether to follow the instructions of the FAA Air Traffic Controller and violate the local criminal ordinance prohibiting flight within 500 feet of Lake Angelus, or to obey the local Prohibition and be subject to a violation action for disregarding the directives of the FAA Controllers, possibly at the risk of safety. **Subsequent to** the Ruling of the District Court, the City **admitted** that the airspace portion of their ordinance was clearly Federally Preempted, and revised their ordinance accordingly. ***Unfortunately, the Circuit Court below appears to have not realized*** that the city vehemently denied that even the airspace portion of its local ordinance was preempted, until the District Court ruled that the 500 foot prohibition is Federally Preempted. (Compare App. 1, Footnote 2 and App. 2 at 46). Had Robert Gustafson not brought this action at all, this clear and potentially dangerous conflict between Local and Federal Law *would still exist today,* making pilots of each land based aircraft travelling to or from Oakland-Pontiac Airport through this airspace liable to serve time in Lake Angelus' jail, even though they were fully complying with the Air Traffic Controller's instructions, and even if they had never heard of the City of Lake Angelus or its ordinances. In the Court below, Petitioner Robert Gustafson requested Attorney Fees and Costs, since his Action has been the "catalyst" which caused the defendant City to make significant changes in

its past practices, even though no direct relief is obtained. *Americans United for Separation of Church and State v. School District of the City of Grand Rapids*, 835 F.2d 627 (6th Cir. 1983). The Opinion of the Circuit Court below concluded that there were no violations of due process or equal protection, **apparently misunderstanding** that the defendant City **did not** voluntarily give up the offending ordinance until they had lost in the District Court below on that issue. (App. 1, footnote 2)

D. The Federal Aviation Administration has Expressly Stated that a State may not draft legislation governing Seaplane operations, and this fact was completely ignored and contradicted by the Circuit Court below.

The Federal Aviation Administration (FAA) in a letter dated November 17, 1994, to the Oregon Office of Legislative Counsel, has expressly stated the Agency's position that a **state may not draft legislation governing seaplane** operations *since uniform regulations governing seaplane operations* throughout the United States are codified at 14 C.F.R. Part 91, section 91.115 of which specifically applies to seaplanes. (App. 6) In addition, the City of Lake Angelus argued in their brief to the Circuit Court below that the FAA had impliedly agreed that the City ordinance was valid because the FAA had published an announcement about the ordinance in the agency's Airports and Facilities Directory. In direct rebuttal to the allegations by the City in this case, the FAA submitted an affidavit which was attached as an exhibit to the Amicus Brief of the **Seaplane Pilots Association** in support of the Ruling of the District Court below, specifically stating

that their inclusion of the ordinance is not intended as a statement that the ordinance is valid or enforceable. (App. 6 at 80, 81) The sole reason that the FAA identifies the ordinance to the pilot community is to attempt to prevent them from being blindsided with arrest and prosecution from a surprise, unknown ordinance. Unfortunately, the FAA Airport and Facilities Directory is not a required document for pilots, and is unlikely to be utilized by seaplane pilots, as discussed by the Amicus Brief of the Seaplane Pilots Association. (App. 5 at 71 and 72)

Unfortunately, **the Circuit Court below made absolutely no mention of either** of these Statements of the FAA which were part of the Record below, and instead the court on its own found dicta in some cases which **DID NOT** involve seaplanes or water use, and by analogy unilaterally determined that the position of the FAA is 180 degrees opposite to the Statements of the FAA on the Record. (Compare App. 1 at pages 16 through 18 with App. 6)

E. Seaplane operations on Lake Angelus PRE-EXISTED the local Seaplane Ordinances by many years, which fact was not addressed by the Circuit Court below.

It is the position of Petitioner that the Statutes and Federal Aviation Regulations **do not** equate water surfaces with land surfaces. (App. 11, minimum altitudes over water versus land.) Indeed, the District Court below clearly recognized this distinction, stating that this **is not** a case which involves issues of Land Use Regulation, but

rather directly attempts to regulate aircraft flight operations. (App. 2, footnote 3 distinguishing *Faux-Burhans v. County Commissioners of Frederick County*, 674 F. Supp. 1172 (D. Md. 1987), *aff'd*, 859 F.2d 149 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989))

However, the Circuit Court below found that even in the area of Land Use Regulation, a local zoning ordinance is Federally Preempted if the Aviation use of the landing site **preexisted** the ordinance attempting to regulate the Aviation use. (App. 1, footnote 7, referencing *Price v. Charter Township of Fenton*, 1995 WL 738386 (E.D. Mich. Nov. 30, 1995))

Pursuant to correspondence which was made part of the record below, seaplanes have been operating at Lake Angelus since prior to 1946. (App. 7) The Lake Angelus ordinances prohibiting seaplanes were not enacted until the 1970s. Nevertheless, the Circuit Court below makes **absolutely no mention** of the **preexisting aviation use** of the Lake Angelus landing area.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL AVIATION ACT AND THE FEDERAL AVIATION REGULATIONS PROMULGATED THEREUNDER PROVIDE A PERVASIVE UNIFORM SYSTEM OF CONTROL OVER AIRCRAFT OPERATIONS ABOVE OR UPON OPEN WATER SUCH THAT A CITY ORDINANCE WHICH PURPORTS TO PROHIBIT AIRCRAFT OPERATIONS ABOVE OR UPON OPEN WATER IS PREEMPTED BY FEDERAL LAW

A. The Opinion of the United States Court of Appeals for the Sixth Circuit, included with this Petition at Appendix 1, is an extremely Broad and Sweeping 27 page Decision. The issues presented have broad-reaching effect and involve much more than the particular rights of the litigants in this case.

The majority in the Circuit Court below attempts to create a major treatise on the law of Federal Preemption in Aviation, and goes far beyond concerns regarding seaplanes. At stake is the integrity of a comprehensive system of federal controls which govern seaplane flight operations and landing areas. The effect of this Opinion will be to fracture the integrity of this system, and to render seaplane travel in this country a **flight through a minefield of local** regulations. This is a sweeping Opinion which creates obstacles in the field of Aviation law, which will diminish or extinguish the ability of the National Air System to function. The ruling of the Circuit Court below has now strayed far from this Honorable Court's ruling in *Burbank*, and relies instead on the rationale of the *Burbank* dissent. As stated by the FAA, if every

local community can enact its own set of aviation rules and standards, *"pilots would find it difficult to utilize the advantage of their aircraft in air commerce due to the bewildering number of laws they would be required to know."* (App. 6)

B. This Opinion has the effect of stripping the Federal Aviation Administration (FAA) of its ability to adequately carry out its Mandate to Foster and Promote Aviation Safety. This Court should consider a request that the FAA provide the Court with its true opinion as to whether the FAA believes that Federal Preemption applies to seaplanes.

The Administrator of the FAA has the responsibility, mandated by Congress, to regulate, supervise and ensure the fostering and growth of aviation, as well as Aviation Safety. *Federal Aviation Act of 1958,* 49 USC 1300 et seq. As discussed in the Statement of Facts, supra, the FAA has expressly stated its Opinion that the regulation of seaplanes is an area which is and must be Federally Preempted. (App. 6)

In addition, the Circuit Court below relies in part on the District Court case of *City of Cleveland, Ohio v. City of Brook Park, Ohio,* 893 F. Supp. 742 (N.D. Ohio 1995). See (App. 1 at 25)

The Circuit Court below adopts the reasoning of the District Court in the *Cleveland* case for the proposition that:

> "The Aviation Act grants to the FAA authority to regulate the use of the airspace, but this does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use

regulations may have some tangential impact on the use of airspace." (App. 1)

It is notable that the United States Court of Appeals for the Sixth Circuit is relying on a District Court case, which upon information and belief is currently pending before the Sixth Circuit, and whose validity is in doubt. In that appellate action, the FAA and/or the United States Department of Justice has apparently submitted briefs arguing that the District Court in the *Cleveland* case was incorrect and that **Federal Preemption should be found.** In *Cleveland,* the FAA and the City of Cleveland are running into local ordinances which are obstacles to the needed updating of the major Hopkins International Airport for safety and the more efficient use of the National Air System. Clearly, the ability of the FAA to ensure a strong Aviation system has run into a serious obstacle, and the Circuit Court's approval of that case makes clear that this decision goes well beyond the issues involved in a local dispute regarding activities solely on one Lake, and has expanded into the area of negatively affecting the needed improvements to the nation's Major airline terminal airports. It was the position of the District Court below that when dealing with water landing sites, **local land use ordinances do not apply,** due to the different treatment of inland waters by the Federal Aviation Regulations. (App. 11 at 46, 47)

In *Country Aviation, Inc. v. Tinicum Township,* 1992 WL 396782 (E.D. Penn.), the FAA was ordered by the court to provide an Opinion through an Amicus Brief, and the FAA provided its opinion that Federal Preemption did apply. As stated Supra, the Record below contains the FAA's own statement that seaplane issues are Federally Preempted. (App. 6) However, the Circuit Court **ignored**

these Statements and found dicta contained in some cases which did not involve seaplane or water issues, and ruled that the FAA believes there is no Federal Preemption in this seaplane case. The Circuit Court then cited this Honorable Court in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984):

> As a reviewing Court, we must give great deference to the views of a federal agency with regard to the scope of its authority.

Petitioner Robert Gustafson would therefore invite this Honorable Court to request that the FAA submit an Amicus Brief to the Court stating its true position regarding the issues in this case.

C. The Opinion of the United States Court of Appeals for the Sixth Circuit is likely to have the effect of damaging and even destroying the Seaplane Industry in the United States by permitting virtually every municipality near any body of water to arbitrarily enact blanket prohibitions against seaplanes based on emotion or personal prejudice.

Water based aviation is an area of the Aviation industry *which has unique need for the protections of the Federal Aviation Regulations on a national scale.* As can be readily observed through the facts in this case, the City of Lake Angelus, for **reasons which are more addressed toward antagonism to seaplanes** than special local conditions unique to this Lake, has undertaken to completely prohibit any activity which the Federal Government has allowed, subject to **Federal** regulation, pursuant to the Federal objective of encouraging aviation activity and

establishing national standards for an inherently nationwide activity.

Because the Circuit Court below has permitted the local municipality to **totally prohibit** the operation of seaplanes for reasons which are not related to any rational concerns, and not related to any special local geographical concerns, (such as insufficient landing area, etc.), the court below has sanctioned not **regulation,** but **prohibition.** Moreover, the after-the-fact formulation by the city of "reasons" for the ordinance appears pre-textual in light of the record below. Even accepting these concerns at face value – noise, diminishment of property values, and the like – the same concerns can and undoubtedly will be articulated for any other lake. The point is this – if one lake can prohibit seaplanes for these reasons, then all lakes can prohibit seaplanes for the same reasons, and the ultimate effect would be that local governments, acting collectively, could effectively bar the use of seaplanes on **all** lakes. Since seaplanes, by definition, land only on water, the net effect would be to allow local government to abolish an entire industry, and an activity which the Federal government, through the FAA, for legitimate federal reasons, has explicitly authorized and encouraged.

The seaplane industry also needs the protection of the FAA for a reason unique to water based aircraft. Pursuant to the rule of local Land Use zoning regulation, if a local government is able to prevent the use of a given piece of land to accommodate aviation use, arguably there would be other pieces of land where an airport or landing field may alternately be placed. However, inland lakes are naturally formed, and are very finite in number.

If a local government is permitted to arbitrarily close down a lake to reasonable seaplane operations, there may very well not be any alternative locations available, and the seaplane industry, and its thousands of jobs, is at real risk of extinction.

The waters in the State of Michigan so far as the water is capable of being owned, belongs to the state, which holds it for the common benefit of all the people. *Collins v. Gerhardt*, 237 Mich. 38 (1926). Therefore, the City of Lake Angelus, even under state law, is not the owner of the surface of the water, the fish in the lake, or the right to the enjoyment thereof. The Michigan Bureau of Aeronautics, a division of the State government, found no valid reason for a prohibition of seaplanes on Lake Angelus. (App. 9)

In that light, the conflict between the local approach and the FAA Federal approach is striking: the Federal approach is to treat seaplanes as an activity to be encouraged, while the city treats the same activity as a "public nuisance," with no value under any circumstance. The local and Federal Governments have taken diametrically opposed positions regarding the activity itself. As indicated in the courts below, seaplane operations perform a vital and necessary role in commerce in a number of parts of the United States, such as Alaska and Louisiana.

Further, seaplanes are mobile in nature. They have the capacity to and in practice do, travel between states. For reasons not unlike those which require federal regulation of aviation generally, the activity itself is one which requires federal uniformity rather than a patchwork of local laws. The concern of the seaplane industry over the

issues at stake in this case, and their significance to the pilots and operators of seaplanes, is highlighted in the Amicus Brief of the national **Seaplane Pilots Association** for the Circuit Court below. (App. 5)

D. The Opinion of the United States Court of Appeals for the Sixth Circuit conflicts with, and relies on the Dissenting Opinion of this Honorable Court in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); to the extent that the specific question has not been addressed with respect to Preemption of aircraft operations on water, the question should be addressed by the Supreme Court.

The District Court below found, in a strong, well written and researched opinion, that the Federal Aviation Act and the regulations promulgated thereunder demonstrate Congressional intent to preempt local regulations governing flight operations. *Gustafson v. City of Lake Angelus*, 856 F. Supp. 320 (1993) (App. 2) Specifically, since the FAA provides safety regulations for take-offs, landings, and operations on water, as well as allowable altitudes, the two sections of the City Ordinances *imposing altitude restrictions and prohibiting operation* upon the surface of the water are preempted by federal law and regulation. Id.

On appeal, the Circuit Court finds neither a pervasive scheme of federal regulation upon which to predicate preemption, nor an actual conflict between the challenged city ordinances and Federal Aviation Regulations. [hereinafter "FARs"]. Petitioner Robert Gustafson contends that this conclusion misapprehends both applicable

law and fact, and has far departed from the reasoning of this Honorable Court in *Burbank*.

As an initial matter, the Circuit Court faults the District Court opinion of Judge Gadola for reading *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) too broadly. The Circuit Court purports to distinguish *City of Burbank* by weight of regulation and number of agencies involved when noise is at issue, rather than by the broad scope of authority granted to the FAA. (App. 1 at 10) The Circuit Court concludes that there is no need of uniformity of seaplane regulation. (App. 1 at 22, 23)

Robert Gustafson submits that the essential lesson of *City of Burbank* is the broad authority of the FAA, and the *necessity for a uniform and exclusive system* of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled. *City of Burbank, supra* at 638-39, *Skydiving Center of Greater Washington, D.C. v. St. Mary's County Airport Comm'n*, 823 F. Supp. 1273, 1282 n. 6 (D. Md. 1993), *Blue Sky Entertainment, Inc. v. Town of Gardiner*, 711 F. Supp. 678, 691 (N.D.N.Y. 1989), *Command Helicopters, Inc. v. City of Chicago*, 691 F. Supp. 1148 (N.D. Ill. 1988). The FAA is not required to exercise its full power in order to occupy the field. *San Diego Unified Port Authority v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981).

As stated in *City of Burbank*:

> The Federal Aviation Act requires a delicate balance between **safety and efficiency,** 49 U.S.C. § 1348(a), and the **protection of persons on the ground.** 49 U.S.C. § 1348(a). . . . The **interdependence of these factors requires a uniform and exclusive system of federal regulation if the**

> **congressional objectives underlying the Federal Aviation Act are to be fulfilled.**

City of Burbank, supra at 638-39.

Similarly, as Judge Jones observes "the very nature of some subjects implicate federal control. Without uniform equipment, rules and safety standards it would be impossible to operate a National Air Transportation system." (App. 1 at 32)

The importance of a uniform system as applied to seaplanes and their pilots was illustrated by several submissions which the Opinion does not address. First, the Brief of Amicus Curiae Seaplane Pilots Association affirmatively states that without a uniform set of regulations operators of seaplanes would *find it virtually impossible to operate without the threat of arbitrary, surprise local arrest and criminal prosecution.* (App. 5 at 66) **Nor does the opinion reference the statement of position submitted to the Oregon Office of Legislative Counsel by the Federal Aviation Administration, specifically with respect to the operation of seaplanes in Oregon state waterways. (Attachment to Supplemental Correspondence Dated, March 7, 1995)** (App. 6) **("The very mobile nature of aviation makes it vitally important that all laws governing aviation be uniform throughout the United States.").**

The Circuit Court does not find pervasiveness demonstrated by FARs *governing minimum altitude over water, nor the right of way rules for operation of seaplanes upon the surface of water. See,* 14 C.F.R. 91.119 (copy attached at App. 11) Rather, the Circuit Court looks to FARs governing the establishment of a civil airport in compliance with

a municipality's "land use plan." (App. 1 at 19, footnote 8). *The opinion improperly equates water with earth,* and relies upon cases involving whether airports may be established on land, contrary to the land use plan of the local municipality. (App. 1 at 22). This distinction was recognized by Judge Gadola in the District Court. (App. 2, footnote 3 at 47)

Ultimately, the conclusion is *by analogy,* that if local government may use its traditional police power to prevent establishment of new airports and control ground space, it may also control the surface of water. (App. 1 at 25, 26). On this basis, the opinion also distinguishes *Price v. Charter Township of Fenton,* 1995 WL 738386 (E.D. Mich. Nov. 30, 1995), as involving a preexisting airport.

In the instant case, use of the lake by seaplanes preexisted the enactment of the ordinances at issue. Further, Mr. Gustafson submits that "pervasiveness" of regulation of seaplane operations must also be viewed with reference to FAA type certification of aircraft and the rating and licensing system of pilots and mechanics. (*See,* App. 5 at 65, 66) (*Citing,* 14 C.F.R. Parts 23, 25, 43, 61 & 67). These regulations *are apparently not accorded any weight* in the pervasiveness analysis, though all govern seaplane aircraft and pilots.

In any event the analogy to land use cases is flawed since a fair reading of the FARs do not equate water with earth. (*See e.g.,* App. 11, minimum altitudes over land versus water). Indeed, notwithstanding FAA opinion as to its place in the determination of where to build and develop airports on land as an owner/operator, it seems the FAA is also of the opinion that a *state may not draft legislation* governing seaplane operations

since uniform regulations governing seaplane operations throughout the United States are codified at 14 C.F.R. Part 91, section 91.115 of which specifically applies to seaplanes. (*Compare,* App. 1 at 17 with App. 6).

Further assuming that the preexistence of a landing area is necessary to find local controls preempted, the opinion does not address the preexisting use of Lake Angelus by seaplanes reflected in the record. *See,* Joint Appendix, Vol. I, p. 60 (copy attached hereto at App. 7).

When the preexisting use of the lake by seaplanes is considered within the analytical framework of the opinion, *then an ordinance predicated in part upon noise reduction must fail. City of Burbank, supra, San Diego Unified Port Authority v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981) (rejecting the claim that a non-proprietor municipality is free to fill in any void left in the scheme of federal control of aviation noise).

The Circuit Court is *simply wrong* in concluding that the landing of a seaplane on a lake, not officially designated as a landing area, is *"tantamount to" the creation of an airport.* The conclusion is not supported by the FARs, which also distinguish "landing areas" from "airports," and may not be deemed contemplated by 14 C.F.R. Part 157.1 *which exempts from Part 157 the very type of "landing area" created by a seaplane's presence. (Compare,* App. 1 at 19, n. 8 with App. 10). *The practical result is a conflict between a local ordinance and the FARs which overlap at the moment the seaplane touches the water.*

Lake Angelus is a natural lake already being used for recreational purposes including power boating and

waterskiing. Seaplanes have in the past and likely will continue to land and take-off from Lake Angelus in the course of intra and interstate travel. A finding of Federal preemption of City ordinances which purport to prohibit aircraft operations over and upon this open water will not affect any as yet unidentified master plan for the development of the area.

Finding these types of municipal ordinances valid, however, *threatens air commerce by allowing a patchwork of local regulations to exist, causing chaos in a unified system of air transportation* which expressly applies to seaplanes, *while imposing sanctions upon unsuspecting aviators.* This uniform system is not, as The Circuit Court suggests, impracticable, rendering every lake in the United States a potential airport. Rather, as Judge Gadola recognized, there are controls. *The FAA may and does restrict or prohibit access to water on a fair and impartial basis with reference to the need of the airway system* as a whole, and with a *unique expertise* not possessed by each local municipality. As stated in the amicus brief of the **Seaplane Pilots Association**, under the ruling of the District Court which upheld Federal Preemption, both seaplane operators and local municipalities are protected, since all seaplane operations *must be conducted pursuant to Federal Aviation Regulations,* and in the event that a local municipality believes that a health, safety or welfare concern, the FAA will restrict or prohibit access to the water. Pursuant to the Circuit Court's ruling, if each of the tens of thousands of local communities can determine their own safety standards, *there will be tens of thousands of different safety standards applying to an individual seaplane operator.* As stated by the

FAA, ***"pilots would find it difficult to utilize the advantage of their aircraft in air commerce due to the bewildering number of laws they would be required to know."*** (App. 6)

E. The Federal Aviation Regulations Do Not Treat Land And The Surface Of Inland Lakes The Same; This Very Significant And Important Distinction Was Recognized By The District Court, But Ignored By The Circuit Court.

As demonstrated *supra*, the Federal Aviation Regulations pertaining to minimum altitudes over land and over inland waters are controlled by two separate subparts of 14 CFR 91.119 (App. 11). Part 91.119(c) Requires a minimum altitude of 500 feet over land, but the regulation **Expressly** states that over open water, there is no minimum altitude. The regulation also states that that airspace necessary for Take off and Landing is also available to the pilot. Obviously, the Airspace down to and including the surface of the inland water is included in the Airspace permitted over the inland water, as it is clearly necessary for Take offs and Landings.

Ironically, the City **now concedes** that it cannot regulate the over water use of seaplanes but can prevent them from actually landing. **It seems bizarre for the Circuit Court to suggest that seaplanes may permissibly travel one inch above the surface of Lake Angelus, but may not come to rest on the surface of the water.** The District Court below recognized that the City position in this regard was a **"distinction without a difference."** (App. 2 at 46) Clearly, there is no rational basis for a prohibition

which still permits airmen to fly within inches of a landing area on which the FAA permits operations.

F. The Circuit Court Attempts To Find FAA Basis For Its Ruling By Holding That Every Time A Seaplane Ever Touches Down On Any Body Of Water, It Is "Tantamount To Creating A New Airport," Which Is Clearly Wrong.

The Circuit Court attempts to rely on 14 C.F.R. Part 157, regarding licensing of Airports. As stated Supra, the Federal Aviation Regulation expressly states that airport licensing is not applicable to non-commercial landing areas which will only accommodate occasional, random use. (App. 10, 14 C.F.R. 157.1 *et seq.*)

Further, as stated elsewhere in this Petition, these landing areas are **Not** subject to nonregulated Aviation use. All FAA certificated Pilots must use the Inland Lakes pursuant to FAA Safety Regulations. In the event any local Government believes that a lake is not appropriate for seaplane operations, **it need only request that the impartial FAA, the Agency with the Unique Expertise in Aviation Safety matters, restrict the waterway if appropriate. Indeed, all that Petitioner has ever asserted in this matter is that the FAA is the authority who has the final say as to whether a Lake is appropriate for seaplane use. Even if Petitioner prevails herein, Petitioner will only have the use of Lake Angelus as a landing site if the fair and impartial FAA finds the lake safe for the intended purpose, as set forth in the Amicus Brief of the Seaplane Pilots Association.** (App. 5 at 75)

One additional troubling aspect regarding the Circuit Court's conclusions regarding Part 157 is that this issue, as well as a number of other issues, **were never raised by the parties,** during the pendancy of the proceedings. The court below used the *De Novo* procedure, and located and relied upon this Federal Aviation Regulation and other caselaw, **with no opportunity for the Parties to brief the matters, or to provide expert guidance** to the court prior to the court rendering its Opinion.

II. A DISCRIMINATORY CITY ORDINANCE VIOLATES A RIPARIAN PROPERTY OWNER/AIRMAN'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION WHERE THE ORDINANCE PROHIBITS A REASONABLE USE OF THE WATER, IS ARBITRARY, CAPRICIOUS AND NOT REASONABLY RELATED TO A GOVERNMENT INTEREST

The Circuit Court concludes that Mr. Gustafson has not articulated any public need for seaplane usage of Lake Angelus, and that the ordinances are rationally related to public health safety and morals. (App. 1 at 27-29)

The opinion ignores and/or misapprehends the distinctions between *regulation and prohibition*; and, the significance of the articulated evidence of need presented, in relation to the quantum of need necessary, to successfully challenge such an ordinance.

A zoning ordinance may not totally exclude a lawful use of land where there is a need for the land use, and the use is appropriate for the location. *English v. Augusta Township*, 204 Mich. App. 33, 514 N.W.2d 172 (1994) (exclusion of a manufactured housing park was deemed improper

where need was established through inquiries of developers as to the availability of land for such parks). An ordinance which totally excludes an otherwise legitimate use *carries with it a strong taint of unlawful discrimination* and a denial of equal protection of the law as to the excluded use. *English, supra* (citing *Kropf v. City of Sterling Heights*, 391 Mich. 139, 155-56, 215 N.W.2d 179 (1974)); *See also, France Stone Co. v. Township of Monroe*, 802 F. Supp. 90, 104 (E.D. Mich. 1990), *Roman Catholic Archbishop v. Orchard Lake*, 333 Mich. 389, 393-94, 53 N.W.2d 308 (1952), *Ottawa Farms v. Polkton Township*, 131 Mich. App. 222, 227, 345 N.W.2d 672 (1983) (presumption of validity does not apply where, on its face, an ordinance totally excludes a legitimate use from the municipality).

In the instant case, need for the use of the surface of the lake by aircraft was articulated through the affidavit of Kyle Kiefling, Manager of the FAA Air Traffic Control Tower at Oakland Pontiac Airport, and the fact that seaplanes have in the past and continue to use the surface of the water. (App. 8; App. 7). Mr. Gustafson submits that the threshold of need is thereby demonstrated, as measured by the quantum of need described in *English, supra.*

The Opinion also states that the record does not disclose a basis on which to find an *arbitrary or unreasonable prohibition.* (App. 1 at 29, 30) The Opinion cites *Georgia Power Co. v. Baker*, 830 F.2d 163 (11th Cir. 1987) for the proposition that boats and aircraft cannot safely coexist, and *Appeal of Green and White Copter, Inc.*, 360 A.2d 283 (Pa. Commw. Ct. 1976) to suggest that seaplane operations might disturb the tranquility of the area.

To the contrary is the *record evidence* which discloses that there was no objective inquiry undertaken by the City which would support the conclusion that the Ordinances were reasonably related to the achievement of the stated objectives. By way of example, the Mayor had no knowledge as to whether the City ever studied the safety history of seaplanes operating around boats. (R.56, Altoff Dep. p. 22); The Police Chief knew of no studies or criteria by which anyone determined that a seaplane would be more or less safe than the power boats that are currently permitted on the lake (R.55, Stefani Dep. p. 69). In fact, the only objective analysis undertaken at the City's request was a review of the lake by James Greshel, Administrator, Safety & Services Division of the Michigan Bureau of Aeronautics. (App. 9). *Mr. Greshel saw no factor which would prevent aircraft safely taking off or landing on Lake Angelus:*

> **[T]here is no significant aviation safety or airspace basis to exclude seaplanes from Lake Angelus.**

(App. 9).

Given the record presented, a rational relationship is not supported by reference to the cited cases. Mr. Gustafson has never proposed to operate a seaplane flight school, which was a factor in *Georgia Power Co., supra.* Nor is Mr. Gustafson proposing to establish a heliport in a residential area as in *Appeal of Green and White Copter, Inc., supra.* Lake Angelus is *a natural lake already being used for recreational purposes* including power boating and waterskiing. *Tranquility is not a factor* on the record presented where the aircraft at issue is quieter

than many of the power boats permitted on the lake. *See e.g.,* Inland Lakes and Streams Act, Mich. Comp. Laws Ann. § 281.951, *et seq;* Mich. Comp. Laws Ann. § 281.1114 (noise levels of 90 decibels or less are acceptable, *Compare, United States v. County of Westchester,* 571 F. Supp. 786 (S.D.N.Y. 1983) (90% of general aviation fleet has a noise level of 76 decibels or less).

Finally, the circuit court concludes that Mr. Gustafson has not been denied equal protection "because all similarly situated persons, including all Lake Angelus residents, watercraft owners, and seaplane pilots are similarly regulated." (App. 1 at 30)

Again with all due respect, *if this syllogism were applied in the context of racial equality, separate but equal laws would still exist.* All persons in a community could be said to be subject to the same regulations governing access to public resources, with the result that one sub-classification of persons is prohibited from enjoying or using that resource.

The constitutional guarantee of equal protection is interposed against invidious discriminations that are entirely arbitrary. *Baldwin v. North Shore Estates Ass'n.,* 384 Mich. 42, 179 N.W.2d 380 (1970). There must be a relation between the classification and the purposes of the act in which it is found. *Baldwin, supra* at 51. The legislature may make classifications of persons, provided such classifications are based on **substantial distinctions** and are in accord with the aims sought to be achieved. *Id.* However, such classification *must be neither arbitrary nor capricious and must rest on reasonable and justifiable foundations. Id.* If a regulation fails to include and affect all

persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary sub-classification, it comes within the constitutional prohibition against class legislation. *Id.* at 52.

Punitive damages may be awarded where there is sufficient evidence from which one can infer that the actions of the individual administrators were in less than good faith and were instead intended to further personal pecuniary interests, to carry out their individual views regarding an issue, and/or to keep certain classes of individuals from entering a township. *Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988).

Again, in this case, *the City undertook no efforts to establish a basis in fact* for the prohibition of seaplanes. To the contrary, the record evidence indicates that seaplanes are compatible with the environment, as demonstrated by harmonious seaplane usage over the years. The waters of the State of Michigan so far as the water is capable of being owned, belongs to the state, which holds it for the common benefit of all the people. *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926). Robert Gustafson, as one of the people, is entitled to reasonable use.

A. The Concurring Opinion Of Judge Jones Of The United States Court Of Appeals For The Sixth Circuit Raises Concerns About The Effect Of This Opinion Which Further Show That The Issues Here Presented Are Broad Reaching And Involve Much More Than The Rights Of The Litigants Involved.

Judge Jones expressly states that he was troubled by the Majority decision in this Opinion, and Concurred

only after numerous attempts at writing a principled dissent. Judge Jones raises a number of very valid concerns, and shows that the Judge finds significance and Issues which touch on a host of Federal Issues, and which will have **effect Well Beyond** the rights of the litigants to this action.

As stated *supra,* the Reversal of the District Court's ruling in this matter is a dangerous contravention of the Intention of Congress to provide a uniform set of Regulations controlling Aviation in the United States. Its effect if allowed to stand will place serious obstacles to the Federal Aviation Administration, and adversely effect Aviation Safety, not only of seaplanes, but will have far reaching affect even in the safe operation of the nation's largest and busiest airports. It will also very likely render a death blow to the Seaplane industry, rendering seaplanes virtually unusable.

CONCLUSION

For all of the reasons stated, Petitioner, Robert Gustafson, prays that this Honorable Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Steven M. Chait & Associates, P.C.
Steven M. Chait

APPENDIX 1

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0065P (6th Cir.)
File Name: 96a0065p.06

Nos. 93-2508/2537

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GUSTAFSON, *Plaintiff-Appellee/ Cross-Appellant,*	)	
v.	)	ON APPEAL from the United States District Court for the Eastern District of Michigan
CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,	)	
Defendants-Appellants/ Cross-Appellees.	)	

Decided and Filed February 27, 1996

Before: JONES, CONTIE, and BATCHELDER, Circuit Judges.

CONTIE, J., delivered the opinion of the court. JONES (p. 28-30), and BATCHELDER (p. 31), JJ., delivered separate concurring opinions.

CONTIE, LEROY J., JR., Circuit Judge. Defendants-appellants/cross-appellees, the City of Lake Angelus, Donald Althoff, Mayor of the City of Lake Angelus, and Michael Stefani, Chief of the Lake Angelus Police Force, appeal the district court's grant of summary judgment to plaintiff-appellee/cross-appellant, Robert Gustafson, holding that city ordinances prohibiting the operation of seaplanes on the surface of Lake Angelus are preempted by federal law.[1] Plaintiff Gustafson cross-appeals from the district court's grant of summary judgment to defendants in regard to plaintiff's 42 U.S.C. §§ 1983 and 1988 claims that the ordinances denied his due process and equal protection rights in violation of the Fourteenth Amendment and that he should be awarded attorneys fees. For the following reasons, we affirm in part and reverse in part.

I.

Plaintiff Robert Gustafson, a seaplane pilot, brought suit against defendants, the City of Lake Angelus (the "City") and various city officials, challenging city ordinances prohibiting the operation of seaplanes on the surface of Lake Angelus as preempted by federal law. Plaintiff sought declaratory and injunctive relief against enforcement of the ordinances. Plaintiff also presented a claim under 42 U.S.C. § 1983 for the violation of his

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[1] The City of Lake Angelus's brief is supported on appeal by *amici curiae*, National Institute of Municipal Law Officers and Michigan Municipal League. Robert Gustafson's brief is supported on appeal by *amicus curiae*, Seaplane Pilots Association.

constitutional rights caused by enforcement of the ordinances and sought an award of attorneys fees pursuant to 42 U.S.C. § 1988.

Plaintiff owns a waterfront home on Lake Angelus, an inland lake in Oakland County, Michigan, that is approximately one and one-half miles long and three-quarters of a mile wide. The City of Lake Angelus is a residential community consisting of about 140 homes around the lake and lies within the airport traffic area and control zone of the FAA air traffic control tower located at the Oakland-Pontiac airport.

Plaintiff Gustafson has been certified as a seaplane pilot by the Federal Aviation Administration ("FAA"). On August 9, 1991, plaintiff landed a rented seaplane on Lake Angelus and then docked and moored the plane at his home on the shore of the lake. Subsequently, a city police officer notified plaintiff that he had violated two city ordinances concerning seaplanes and warned him not to land his seaplane on the lake again. Plaintiff was not prosecuted for violating the ordinances.

Plaintiff was in violation of city ordinances 66(E) and 25(J). Ordinance 66(E) is an amendment to the City's zoning ordinance, which reads in relevant part:[2]

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[2] When the suit was filed, ordinance 66 included an altitude regulation which prohibited flying over the City at altitudes less than 500 feet. Although the altitude regulation had never been enforced against plaintiff or anyone else, plaintiff Gustafson also challenged its validity. The City acknowledged that this provision was federally preempted and did not argue in support of its validity. The altitude regulation was subsequently deleted from ordinance 66 by amendment and is not at issue in this appeal.

> 4.10. *Nuisances prohibited.* Land may not be used for any of the following purposes, all of which are declared to be public nuisances:
>
> E. The mooring, docking, launching, storage, or use of any . . . aircraft powered by internal combustion engines. . . .

Ordinance 25(J) is an amendment to the City's nuisance ordinance, and states that the following is a public nuisance:

> J. The landing upon the lands, waters, or ice surface within the Village of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft.

After plaintiff was warned not to land his seaplane on the lake, he asked the city council to rescind or modify the ordinances. In response to plaintiff's efforts, on September 10, 1991, the city council issued a resolution declaring that ordinances 25(J) and 66(E) were intended to "protect the public health, safety, and general welfare" of the people and property of the City. The council listed "noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water, destruction of property values, and interference with other lawful uses of the lake enjoyed by the great majority of citizens, including boating, sailing, fishing, swimming, and other recreational uses," as ways in which the welfare of the City was protected by the ordinances.

Plaintiff filed this action in the United States District Court for the Eastern District of Michigan, contending that the ordinances are preempted by federal and state

law and that they violate his constitutional rights. He asked the court to: (1) declare that ordinances 25(J) and 66(E) are void, unenforceable, and unconstitutional pursuant to 28 U.S.C. § 2201; (2) issue a permanent injunction enjoining defendants from enforcing the ordinances; and (3) award costs and attorneys fees to plaintiff pursuant to 42 U.S.C. § 1988 for the alleged constitutional violations under 42 U.S.C. § 1983.

On October 21, 1993, the district court heard the parties' cross-motions for summary judgment and plaintiff's motion for declaratory judgment and a permanent injunction. On October 22, 1993, the district court issued an opinion. Pursuant to 28 U.S.C. § 2201, the court found that ordinances 25(J) and 66(E) governing the operation of seaplanes on the surface of Lake Angelus are preempted by federal law. The court granted plaintiff Gustafson's motion for summary judgment on this issue and issued a permanent injunction against the City from enforcing the ordinances.

However, in regard to plaintiff's claim under 42 U.S.C. § 1983 for violations of his constitutional rights, the court granted the City's motion for summary judgment. The court stated that even though it had decided the case based on federal preemption, the court would address the section 1983 claim in order to determine if plaintiff was deserving of costs and attorneys fees under 42 U.S.C. § 1988. After examining plaintiff's constitutional claims, the court found they were without merit. The court determined that plaintiff failed to show that his due process or equal protection rights were violated and that he made no showing that the ordinances were overbroad, ambiguous, or vague. In addition, the court found

that in order to support the ordinances, the City had presented multiple rationales, which were rationally related to legitimate government interests. For these reasons, the court granted the City's motion for summary judgment on plaintiff's 42 U.S.C. § 1983 claim and determined that plaintiff should not be awarded costs and attorneys fees pursuant to 42 U.S.C. § 1988.

Defendants filed a timely notice of appeal in regard to the district court's issuance of a permanent injunction prohibiting the City from enforcing the ordinances against the operation of seaplanes on the surface of Lake Angelus. Plaintiff Gustafson filed a cross-appeal, challenging the portions of the district court's opinion that found no violation of due process or equal protection rights pursuant to 42 U.S.C. § 1983 and denied costs and attorneys fees pursuant to 42 U.S.C. § 1988.

II.

We must first decide whether the district court erred in determining that the City of Lake Angelus ordinances 25(J) and 66(E), which prohibit the operation of seaplanes on the surface of Lake Angelus, are preempted by federal law.

The doctrine of preemption springs from the Supremacy Clause of the Constitution: "[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2; *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). As interpreted by Chief Justice Marshall, "in every case, the act of Congress, or the treaty, is supreme; and the law of

the state, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Preemption is predicated on congressional intent. The will of Congress to monopolize an area of legislation may be expressed in the authorizing statute and in the regulations enacted pursuant to that statute. *Hillsborough County, Florida v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985).

A statute may be construed as preemptive under three circumstances. *Id.* First, Congress, in enacting a federal statute, may express a clear intent to preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203 (1983). Second, absent express preemption, federal law may have an implied preemptive effect if Congress revealed this intent by "occupying the field" of regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). There is implied preemption when there is a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153. There is a third type of preemption when state law actually conflicts with federal law. Such conflict occurs where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law

"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The focus of a preemption inquiry is on congressional intent. In the present case, we must determine whether Congress, in passing the Federal Aviation Act, 49 U.S.C. §§ 40101-41901 [formerly 49 U.S.C. §§ 1301-1557][3] intended to preempt the right of a local government to designate and regulate aircraft landing areas, specifically seaplane landings on a lake. Plaintiff concedes that Congress has not expressly spoken on this issue, but argues that the City's ordinances are preempted under the second prong of the preemption doctrine – pervasive federal regulation of the field.

The district court in *Gustafson v. City of Lake Angelus*, 856 F. Supp. 320 (E.D. Mich. 1993) found that the dictates of the Federal Aviation Act ("the Act") and the regulations enacted pursuant to it implied that Congress intended that the designation of landing sites for seaplanes is preempted by federal law. The district court found that former section 1508(a) of the Act stated: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . . " Furthermore, the district court found that Congress expressly directed the formulation of comprehensive regulations governing aircraft operations pursuant to former sections 1348(a) &

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[3] On July 5, 1994, Congress restated the laws related to transportation in one comprehensive title. The former Code sections are provided in brackets.

(c), and therefore, the ordinances at issue are preempted by federal law.

It is true that the Act indicates that the FAA has exclusive authority in regulating the airspace over the United States. Section 40103(b)(1) [former § 1348(a)] reads in relevant part:

> The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the *navigable airspace* and assign by regulation or order the use of the *airspace* necessary to ensure the safety of aircraft and the efficient use of airspace.

49 U.S.C. § 40103(b)(1) (emphasis added). Section 40103(b)(2) [former § 1348(c)] provides as follows:

> The Administrator shall prescribe air traffic regulations on the *flight of aircraft* (including regulations on safe altitudes) for –
>
> (A) navigating, protecting, and identifying aircraft;
>
> (B) protecting individuals and property on the ground;
>
> (C) using the navigable airspace efficiently; and
>
> (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 40103(b)(2) (emphasis added). However, we believe the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight is distinguishable from the regulation of

the designation of plane landing sites, which involves local control of land (or, in the present case, water) use.

The district court's analysis that ordinances 66(E) and 25(J) are preempted by federal law relied heavily upon the Supreme Court's opinion in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). In *Burbank*, the Supreme Court stated that in light of the pervasive nature of the scheme of federal regulation of aircraft noise, the FAA, in conjunction with the Environmental Protection Agency ("EPA"), has full control over aircraft noise, pre-empting state and local regulation. *Id.* at 638. Therefore, the Supreme Court held that the City of Burbank could not use municipal curfews to impose noise regulations on aircraft operations. In the present case, the district court relied on the Supreme Court's language in *Burbank*, which stated that the FAA has broad authority to regulate the use of the navigable airspace, in holding that the City's ordinances are preempted under the second prong of the preemption doctrine – pervasive federal regulation of the field.

We believe the district court read *Burbank* much too broadly in finding it to be dispositive in the present case. The district court failed to comprehensively examine the federal statutes and regulations pertaining to aircraft landing areas in order to glean the existence of preemptive pervasiveness, which is the proper approach established by the Supreme Court in *Burbank*. When the Court in *Burbank* turned to the FAA regulations to determine federal pervasiveness in the regulation of aircraft noise, it discovered: (1) the existence of express language in a Senate Report, which stated that "States and local governments are preempted from establishing or enforcing

noise emission standards. . . . "; (2) the existence of two agencies, the EPA and the FAA, with control over aircraft noise; and (3) the imposition of a variety of regulations governing noise by the Administrator of the FAA. *Id.* at 628-34. The Court in *Burbank* focused upon the fact that the Federal Aviation Act, the attendant regulations, the legislative history of the Act, the Noise Control Act, and the EPA clearly identified noise regulation as a field fully regulated by the federal government. The combination of these factors made it obvious that in regard to noise control, Congress intended to occupy the field of regulation. *Id.* at 638. Based on this evidence of pervasiveness, the Court in *Burbank* determined that aircraft noise was so comprehensively and strictly regulated by the federal government that it precluded enforcement of state or local laws on the same subject. *Id.* at 638-39.

In contrast, in the present case, an examination of the Federal Aviation Act and regulations concerning seaplanes and aircraft landing sites indicates that the designation of plane landing sites is not pervasively regulated by federal law, but instead is a matter left primarily to local control. In contrast to the pervasive scheme of federal regulation of aircraft noise found in *Burbank*, we fail to identify any language in the Act, the regulations promulgated pursuant to the Act, or the legislative history of the Act, which by implication preempts enforcement of the City's ordinances prohibiting the operation of seaplanes on Lake Angelus.

The applicable statutes and regulations indicate the following. In regard to federal preemption, the Act states:

> (b) **Preemption.** – (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. 41713(b)(1) [former § 1305(a)(1)]. The plain language of 41713(b)(1) expressly prohibits States from regulating aviation rates, routes, or services, but the City of Lake Angelus ordinances do not infringe on these expressly preempted fields. The FAA has acknowledged that land use matters within the federal aviation framework are intrinsically local. For example, the regulation concerning the procedures governing the establishment of a civil airport indicates the following:[4]

> FAA determinations.
>
> (a) The FAA will conduct an aeronautical study of an airport proposal and, after consultations with interested persons, as appropriate, issue a determination to the proponent and

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[4] Anyone proposing to establish a new airport is required to notify the Department of Transportation before any consideration or use begins. 14 C.F.R. § 157.3. In its review of an airport proposal, the FAA considers the following: the effects the proposed action would have on existing or contemplated traffic patterns of neighboring airports; the effects the proposed action would have on the existing airspace structure and projected programs of the FAA; and the effects that existing or proposed manmade objects (on file with the FAA) and natural objects within the affected area would have on the airport proposal. 14 C.F.R. § 157.7(a).

> advise those concerned of the FAA determination. . . . While determinations consider the effects of the proposed action on the safe and efficient use of airspace by aircraft and the safety of persons and property on the ground, *the determinations are only advisory. . . . A determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts.*

14 C.F.R. § 157.7(a) (emphasis added). Clearly, the FAA defers to local zoning ordinances, since this regulation requires the establishment of an airport in compliance with a municipality's land use plan. As the regulation states, the proponent of the establishment of an airport must comply with any local law, ordinance or regulation.[5] Moreover, the regulation indicates that environmental impact and land use compatibility are matters of local concern and will not be determined by the FAA. Thus, in contrast to *Burbank*, in which the Supreme Court stated that the FAA made clear its intent to pervasively regulate aircraft noise, FAA regulation 14 C.F.R. § 157.7 indicates that the FAA does not intend to pervasively regulate the designation of the location of airports. We find no regulations governing the designation of the location of private airfields or seaplane landing sites. Under 14 C.F.R. § 157.7, the FAA recognizes that within the federal aviation framework, local zoning ordinances governing land

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[5] The definition of airport includes a "seaplane base." 14 C.F.R. § 157.2.

use must be complied with. We believe this rationale applies in the present case, which concerns water use. Under the general provisions of the Act, an airplane landing area is defined as follows:

> "landing area" means a place on land *or water*, including an airport or intermediate landing field, used, or intended to be used, for the take-off and landing of aircraft, even when facilities are not provided for sheltering, servicing, or repairing aircraft, or for receiving or discharging passengers or cargo.

49 U.S.C. § 40102(28) [former § 1301(27)] (emphasis added). Since a landing area includes a body of water, we find no merit to plaintiff's argument that "the inland waters," such as Lake Angelus, are part of the navigable airspace of the United States over which the federal government exerts preemptive control. The inland waters are part of the earth's surface, and water (as well as land) use compatibility are matters of local control.

The district court relied on two federal regulations concerning the operation of aircraft on the surface of the water to find pervasive preemption of the field. We disagree with the district court's analysis in this regard. 14 C.F.R. § 91.115(a) states:

> Right-of-way rules: Water operations.
>
> (a) *General.* Each person operating an aircraft on the water shall, insofar as possible, keep clear of all vessels and avoid impeding their navigation, and shall give way to any vessel or other aircraft that is given the right-of-way by any rule of this section.

This regulation pertains to the safe operation of seaplanes in order to avoid collisions and contains no specifications for seaplane landing sites. 14 C.F.R. § 91.119 states:

> Minimum safe altitudes: General
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> . . . .
>
> (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

This regulation is also directed to the operational safety of seaplanes, not to the designation of landing areas or restrictions on access rights. We do not believe these two regulations pertaining to "right of way rules" and "minimum safe altitudes" illustrate an intent by Congress to pervasively regulate the field and to exert exclusive federal control over seaplane landing sites. To the contrary, there is no scheme of federal regulation designating locations for seaplane landings. The district court confused federal regulation of "the navigable airspace" and "the flight of aircraft" with regulation of use of the water surface itself, and erred in viewing the City's ordinances as pertaining to aircraft operations rather than to municipal water use. Because there is no pervasive, extensive, or complete federal regulatory scheme that controls seaplane landing sites, we find that no reasonable inference may be drawn under the second prong of the preemption doctrine that Congress left no room for the states or local

governments to regulate in this area. *See Hillsborough County, Florida, v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719-20 (1985).

Moreover, there is nothing in the City's ordinances which conflicts with or impedes the objectives of federal law under the third prong of the preemption doctrine. For example, the portion of ordinance 25(J) that prohibits "[t]he landing upon the lands, waters, or ice surface within the Village of Lake Angelus of any aircraft" does not make compliance with federal aviation law impossible or create obstacles to the attainment of federal goals. The pertinent language in the ordinances does not impinge upon the "exclusive sovereignty of airspace of the United States," 49 U.S.C. § 40103(a)(1) [former § 1508(a)], nor does it interfere with the congressional mandate to insure the safety of aircraft and the efficient utilization of airspace pursuant to 49 U.S.C. § 40103(b)(2) [former § 1348(c)]. Instead, the ordinances are limited to the regulation of the lake surface within the borders of the City, and there is no conflict with federal law. The prohibition against landing seaplanes on Lake Angelus does not inhibit in a proscribed fashion that which is preempted by federal law – the free transit of the navigable airspace – but instead restricts local water use, which is not preempted by federal law.

In several cases, the FAA has indicated that within the federal aviation framework, it does not concern itself with land or water use zoning issues. In *Blue Sky Entertainment, Inc. v. Town of Gardiner*, 711 F. Supp. 678, 683 (N.D.N.Y. 1989), the FAA challenged portions of a local

ordinance which attempted to regulate parachute jumping, aircraft operations, and aircraft noise, but the FAA specifically stated:

> To the extent the ordinance regulates land use in the Town of Gardiner, it is not preempted by federal regulation of aviation.

In another case, *Dallas/Fort Worth Int'l Airport Bd. v. City of Irving*, 854 S.W.2d 161, 169 (Texas Ct. App.), *vacated by*, 868 S.W.2d 750 (Tex. 1993), the FAA stated, "whether the airport is required to obtain a local permit [for an expansion project] is a matter of local law and is not relevant to the approval of the federal project."[6] In *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991), the court upheld the municipal regulation of a heliport, pointing out that the FAA in an Environmental Impact Statement had written:

> In the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator. Rather, the FAA facilitates airport development by providing Federal financial assistance, and reviews and approves or disapproves revisions to Airport Layout Plans at Federally funded airports.

The FAA has, thus, made clear that although FAA regulations preempt local law in regard to aircraft safety, the navigable airspace, and noise control, the FAA does not believe Congress expressly or impliedly meant to preempt regulation of local land or water use in regard to the

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[6] Even though this case was vacated and remanded for reconsideration in light of a change in state law, the position the FAA took is instructive.

location of airports or plane landing sites – whether for airplanes, helicopters or seaplanes. As a reviewing court, we must give great deference to the views of a federal agency with regard to the scope of its authority. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[7]

This limitation on the preemptive impact of the FAA is also found in the Supreme Court's opinion in *Burbank*. As Justice Rehnquist stated:

> A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility.

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[7] We believe these cases contradict the statement of the court in *Price v. Charter Township of Fenton*, 1995 WL 738386 (E.D. Mich. Nov. 30, 1995), indicating that federal courts have found land use restrictions and zoning laws regarding prohibitions on the location of plane landing sites as violative of the Supremacy Clause. *Id.* at 4. We find *Price* distinguishable from the present case because the regulation at issue in *Price* concerned the frequency of flight operations at the plaintiff's airport, not whether an airport could be established in the first place. We do not believe the ordinances in the present case can be fairly construed as regulations of flight operation, because the FAA does not interpret the designation of the location of plane landing sites as such. As the court in *Price* indicated, if Fenton Township wanted "to prevent the construction of an airport that it felt would be disruptive to the surrounding area, it most likely could do so." *Id.*

411 U.S. at 653 (Rehnquist, J., dissenting). Justice Rehnquist pointed out that "while Congress clearly intended to pre-empt the states from regulating *aircraft in flight*, the author of the bill, Senator Monroney, specifically stated that the FAA would not have control *'over the ground space of airports.'* " *Id.* at 644 (emphasis added). The majority in *Burbank* did not disagree with this conclusion and indicated that its holding was limited to regulation of aircraft noise. By analogy, we believe that if a local governing body may use its traditional police power to prevent the establishment of a new airport and control the ground space of airports, it may also prevent the landing of aircraft on specified bodies of water within its jurisdiction through its zoning authority, as the City of Lake Angelus has done in the present case.[8] A prohibition against landing on a body of water falls in the category of "control over ground space," which the legislative history of the Act indicates is a matter of local control, rather than in the category of the regulation of aircraft in flight, which is a matter of preemptive federal control. In reviewing an issue of preemption, this court must "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless there [is a] clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). We find no purpose manifested in the Federal

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[8] We believe it is appropriate to find that the landing of a seaplane on a lake, not officially designated as a landing area, is tantamount to, and can be reasonably construed as, the creation of an airport. Under FAA regulations, the broad definition of airport includes seaplane bases. 14 C.F.R. § 157.2.

Aviation Act to preempt local law concerning the designation of landing sites for aircraft, including seaplanes. For this reason, we believe the district court erred in finding that *Burbank* was dispositive of the present case, which does not involve regulation of aircraft noise, but instead involves control of ground space, which has traditionally been the province of local governments. *See Wright v. County of Winnebago*, 73 Ill. App. 3d 337 (1979) (in absence of any evidence of pervasive federal regulation, FAA does not preempt local government's power to restrict location of plane landing areas).

The district court also relied on *Command Helicopters, Inc. v. City of Chicago*, 691 F. Supp. 1148 (N.D. Ill. 1988), in finding that the City's ordinances are preempted by federal law. In *Command Helicopters*, the court determined that because the FAA had prescribed a regulation governing external-load lifting operation of helicopters, a local ordinance involving a more stringent specification was preempted. We do not believe *Command Helicopters* is on point. The local ordinance in *Command* conflicted with an existing federal regulation, and the court found that a uniform and exclusive system of federal regulation governing helicopter external-load lifting operations was necessary for the congressional objectives of the FAA to be fulfilled. In contrast, in the present case, there is no federal regulation preventing seaplanes from landing on lakes with which the City's ordinances conflict, nor is there a need for nationwide uniformity in order for the objectives of the FAA to be fulfilled.

We believe the present case is analogous to *Faux-Burhans v. County Commissioners of Frederick County*, 674 F. Supp. 1172 (D. Md. 1987), *aff'd*, 859 F.2d 149 (4th Cir.

1988), *cert. denied*, 488 U.S. 1042 (1989), in which the owner of an airplane landing strip, who wanted to create a private airport, brought suit, challenging the county's zoning restrictions on airfield operations. The district court in *Faux-Burhans* found that the county zoning restrictions were not preempted by federal law and the Court of Appeals for the Fourth Circuit affirmed. The district court in *Faux-Burhans* examined the Supreme Court's opinion in *Burbank* and found it distinguishable. The court found that whereas the local noise regulations in question in *Burbank* clearly infringed upon federally preempted regulation of the navigable airspace, the plaintiff, Faux-Burhans, could point to no federal statute or regulation explicitly or implicitly preempting regulation of the size or scope of operations at a private airport (an airport not "otherwise open to air travel in general"). *Id.* at 1174. The court stated, "Certainly, these are all areas of valid local regulatory concern, none of which is federally preempted, and none of which inhibits in a proscribed fashion the free transit of navigable airspace. And just as certainly, no federal law gives a citizen the right to operate an airport free of local zoning control." *Id.*

We believe a similar rationale applies in the present case. *Faux-Burhans* involved use restrictions imposed on the creation of a private airport by local zoning ordinances. If a municipality, by zoning ordinances, may impose use restrictions on the creation of a private airport, we believe it may also impose use restrictions on a body of water within the municipality and prohibit the landing of seaplanes without being preempted by federal law. Just as the owner of an airplane does not have the authority to land wherever he chooses on land and must

comply with local zoning ordinances, the owner of a seaplane does not have the authority to land a seaplane wherever he chooses.

Another case which is directly on point is *Garden State Farms, Inc. v. Bay*, 77 N.J. 439 (1978). The plaintiff, a company seeking to establish and operate a landing area for helicopters, argued that the municipal ordinance prohibiting the creation and operation of a helistop was preempted by federal law. The court in *Garden State Farms* held that federal legislation has not preempted state and local jurisdiction with respect to the placement of private helistops. *Id.* at 446. The court stated that the local regulation of small, relatively isolated, privately owned helistops did not present a situation where "preemption may be predicated upon a felt need for a monolithic system of regulation." *Id.* at 446-47. The court explained:

> [A]s a policy matter, if federal preemption were found, . . . state and local governments, which are the only bodies that currently license privately operated helistops and heliports, would be shorn of this regulatory responsibility. Congress could not have intended to create a governmental vacuum with respect to privately operated helistops.

Id. at 449.

Similar policy concerns are at issue in the present case. It is not feasible for Congress to determine how local land or bodies of water within a municipality are to be used in regard to the location of aircraft landing sites. The needs of a state such as Alaska, in which seaplanes play a vital commercial role, and Michigan, in which seaplanes are used primarily for recreation, are different,

and this difference requires local, not national, regulation. The federal government, rather than "preempting the field," has not entered the field and exerts no control over the location of seaplane landing sites. If the federal government intended to preempt, we believe there would be a mass of regulations concerning seaplane landing sites, which simply do not exist. No federal statute or regulation addresses the action prohibited by the City of Lake Angelus ordinances or delineates the boundaries of local control in regard to seaplane landing sites. We find this absence of federal regulation significant. The Supreme Court, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983), stated that the Court must focus on whether the matter on which the local government asserts the right to act is in any way regulated by the federal Act and found that the only reasonable inference to be drawn from silence is that Congress intended local governments to continue to regulate. *Id.* at 208. If federal preemption were found in the present case, a "governmental vacuum" would occur because the federal government does not regulate the location of seaplane landing sites, and state and local governments would be shorn of their regulatory authority. *See Garden State Farms*, 77 N.J. at 449. The result would be entirely impracticable, and every lake in the United States would become a potential airport for seaplanes. In regard to the location of commercial airports, the FAA has indicated that it will not adopt regulations controlling local land use, because the needs of each locality are unique and different. *See* 14 C.F.R. § 157.7. Courts have recognized that federal aviation law does not preempt local regulation of the location of airports or

heliports, which must comply with local zoning ordinances. Just as Congress did not intend to create a regulatory vacuum with respect to the location of commercial or privately operated airports and heliports on land, we believe Congress did not intend to create a vacuum with respect to the location of seaplane landing sites on water, but left the matter to local control.

Finally, our conclusion that the Supreme Court's decision in *Burbank* does not preempt all state and local zoning power with respect to aircraft landing sites is supported by ample case law. *See Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990) (city's zoning ordinance prohibiting initial siting of heliport not preempted by federal law); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (local governments' noise abatement plans that do not impinge on aircraft operations not preempted), *cert. denied*, 455 U.S. 1000 (1982); *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F. Supp. 742 (N.D. Ohio 1995) (the FAA does not possess zoning authority merely by virtue of its broad mandate to regulate matters relating to aviation; state or local zoning or land use laws are not preempted); *Wood v. City of Huntsville*, 384 So. 2d 1081 (Ala. 1980) (although Congress has extensively and exclusively regulated use of the navigable airspace of the United States, state and local governments retain substantial control over ground usage); *Bethman v. City of Ukiah*, 216 Cal. App. 3d 1395 (1989) (no federal preemption of state or municipal regulation of the location and environmental impact of airports); *Wright v. County of Winnebago*, 73 Ill. App. 3d at 344 (FAA does not preempt local zoning authority from determining appropriate use of land; the right not to have an airport in the

first place is local); *Harrison v. Schwartz*, 319 Md. 360 (1990) (a zoning ordinance that does not regulate aircraft noise emissions or the actual conduct of flight operations may withstand a preemption argument), *cert. denied*, 498 U.S. 851 (1990); *People v. Altman*, 304 N.Y.S.2d 534, (N.Y. Dist. Ct. 1969) (town ordinance prohibiting seaplanes from taking off or landing upon any portion of town's channel system except in an emergency is in harmony with federal law on the subject and is not preempted).

To conclude, there is a distinction between the regulation of the navigable airspace and the regulation of ground space to be used for aircraft landing sites. Although the regulation of the airspace of the United States has been preempted by Congress, we find Congress did not intend to preempt the regulation of water use in regard to aircraft landing sites as indicated by an examination of the Federal Aviation Act, the attendant regulations, the legislative history of the Act, and by statements made by the FAA itself. As the court in *City of Cleveland* stated:

> The Aviation Act grants to the FAA authority to regulate the use of airspace, but this does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use regulations may have some tangential impact on the use of airspace.

893 F. Supp. at 751. Because the City of Lake Angelus could lawfully prohibit airplane and helicopter landings on city land under established case law, it logically follows that the City may also prohibit seaplane landings on

Lake Angelus under its zoning authority. Federal preemption of the airspace under the Act does not limit the right of local governments to designate and regulate aircraft landing areas, including seaplane landings on lakes. Therefore, the Federal Aviation Act does not preempt City of Lake Angelus ordinances 25(J) and 66(E), which prohibit seaplanes from landing or operating on the surface of Lake Angelus. The district court is reversed on this issue.[9]

III.

On cross-appeal, plaintiff alleges that as a riparian property owner and airman qualified to safely operate seaplanes, the ordinances at issue have deprived him of due process and equal protection in violation of the Fourteenth Amendment, and that the ordinances are exclusionary, arbitrary, capricious and not reasonably related to a legitimate government interest.

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[9] Plaintiff also argues that the ordinances are preempted by state law, relying on Mich. Comp. Laws Ann. § 281.1017 and the Michigan Aeronautics Code, Mich. Comp. Laws Ann. § 259.1 *et seq.* We disagree. There is nothing in these provisions to indicate the legislature's intent to take over a municipalities' responsibilities in the area of land or water use, development, or the location of aeronautical landing sites. *See Garden State Farms, Inc.*, 77 N.J. at 445 (although state aviation act embraced a comprehensive scheme of state regulation to promote safety and aeronautical progress, it did not preclude municipalities from determining whether or not aeronautical facilities should be constructed within their boundaries).

Under Michigan law, a party alleging exclusionary zoning must be prepared to establish both that the exclusion exists throughout the municipality and that there is a demonstrated need for the use he proposes. *Fremont Tp. v. Greenfield*, 132 Mich. App. 199, 204 (1984). The City of Lake Angelus is Michigan's smallest city by population and is an entirely residential community. The City argues that although plaintiff Gustafson wants to land seaplanes on Lake Angelus, he has not articulated any public *need* for such lake usage. The City also contends that a local legislative body's determination of the public interest and adoption of regulations which are rationally related to it must be deferred to. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir. 1992).

We agree with the City. As this court stated in *Stupak – Thrall v. United States*, 70 F. 3d 881 (6th Cir. 1995):

> The Michigan Supreme Court has explicitly held that local governments may regulate their citizens' riparian rights pursuant to their inherent police powers. In *Miller v. Fabius Township Board*, 366 Mich. 250, 114 N.W.2d 205 (1962), the court allowed time restrictions on waterskiing. In *Square Lake Hills Condo. Assn. v. Bloomfield Township*, 437 Mich. 310, 471 N.W.2d 321 (1991), the court allowed regulation of boat docking and launching. In *Square Lake Hills*, especially, the court made it clear that plaintiffs' recreational riparian rights were subject to regulation for the protection of "health, safety, and welfare" of the general public. *Id.*, 471 N.W.2d at 322.

Id. at 889. *See also Hess v. West Bloomfield Twp.*, 439 Mich. 550 (1992) (a township has the authority to regulate riparian rights as part of its zoning power). Thus, Michigan

law makes it clear that riparian rights are not absolute, but are subject to reasonable regulation, and municipalities can restrict boat usage by riparian owners. It follows by analogy that seaplane usage by riparian owners can also be restricted. The riparian rights asserted by plaintiff Gustafson are not absolutely protected by the Fourteenth Amendment, but instead are subject to reasonable regulation.

The test under Michigan law for determining whether an ordinance is reasonable requires an assessment of the existence of a rational relationship between the exercise of police power and the public health, safety, morals, or general welfare in a particular manner in a given case. *Square Lake Hills Condo. Ass'n v. Bloomfield Township*, 437 Mich. 310, 317 (1991). Moreover, as this court has stated in *Pearson*, where zoning legislation is subject to substantive due process attack, the scope of review by the federal court is even more deferential than for review of state administrative action. 961 F.2d at 1223. Although when reviewing administrative action, the federal court must make an extremely limited review of the evidence, when reviewing legislative acts, such as zoning ordinances, this is not permitted. The only permissible inquiry is whether the legislative action is rationally related to legitimate land use concerns. *Id.*

In the present case, we find that the City's concern with "noise,[10] danger, apprehension of danger, . . . destruction of property values, and interference with other

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[10] Plaintiff's argument that the ordinances are preempted because one of the rationales provided by the City for their enactment was the prevention of aircraft noise has no merit. As the court in *Wright v. County of Winnebago*, 73 Ill. App. 3d at 344,

lawful uses of the lake enjoyed by the great majority of citizens, including boating, sailing, fishing, swimming, and other recreational uses" fulfills the requirements of this test. In *Georgia Power Company v. Baker,* 830 F.2d 163 (11th Cir. 1987), the court upheld the right of a federally licensed power company to prohibit seaplanes from using its reservoirs, even though its license, issued by the Federal Energy Regulatory Commission, required that it permit the use of the reservoirs "for the purpose of full public utilization of such lands and water for navigation and for outdoor recreational purposes, including fishing and hunting." *Id.* at 164. The court noted that "Georgia Power's primary concern in prohibiting seaplanes was the safety of the boating public," *id.*, and "[m]ore importantly, the company decided that seaplane operation on its reservoirs would present significant hazards both to the boating public and to seaplane pilots. Take-off and landing constitute a danger in themselves; and the exposed propeller of seaplanes poses an additional hazard to people on the lake as well as around docking facilities and boat ramps." *Id.* at 167. The court ruled that Georgia Power's prohibition of seaplanes on its reservoirs was a reasonable limitation. We find that for similar reasons, the City of Lake Angelus ordinances are reasonable limitations on the use of Lake Angelus and are rationally related to a legitimate government interest in safety.

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pointed out, once an airport is operating, it may be that only the FAA can regulate the resulting noise problem, but the right to choose not to have an airport in the first place on the basis of aircraft noise is local and is not preempted.

In *Appeal of Green and White Copter, Inc.*, 360 A.2d 283 (Pa. Commw. Ct. 1976), the court found that the township's total exclusion of heliports from residential areas was designed to protect the public interest. The court stated:

> The potential safety problems and disturbances to the tranquility of the area are obvious. While air travel facilities are not nuisances per se, they may become nuisances in fact in a particular situation. Necessarily, the proposed use in this case would impinge upon the rights of neighboring landowners in the use and enjoyment of their property. If any further evidence of the potential for interference with adjoining property is required, it is provided by the fact that air flights over property have been found to constitute a taking of land near airports. *See, e.g., Griggs v. Allegheny County*, 369 U.S. 84 (1962).

Id. at 285.

We believe that similar legitimate concerns about the dangers inherent in the landing and taking off of seaplanes and the adverse effect on the "tranquility of the area" by low-level air traffic are found in the present case. The record does not disclose a basis on which to find that the City's prohibition against seaplane landings on Lake Angelus is arbitrary or unreasonable. Moreover, plaintiff has not been denied equal protection of the law, because all similarly situated persons, including all Lake Angelus residents, watercraft owners, and seaplane pilots are similarly regulated. *See City of Shreveport v. Conrad*, 212 La. 737, 744 (1947). The district court's denial of plaintiff's 42 U.S.C. § 1983 claim that the ordinances

deprived him of his due process and equal protection rights under the Fourteenth Amendment is therefore affirmed.

In regard to attorneys fees, a claim premised on a violation of the Supremacy Clause through preemption is not cognizable under 42 U.S.C. § 1983. *J. & J. Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476-77 (10th Cir. 1985). Since plaintiff's alleged violations of due process and equal protection are unmeritorious, the ordinances have not violated any civil right that is redressable under 42 U.S.C. § 1983, and the district court properly denied attorneys fees pursuant to 42 U.S.C. § 1988.

IV.

To conclude, the district court is affirmed in part and reversed in part. The district court's grant of summary judgment to defendants in regard to plaintiff's 42 U.S.C. §§ 1983 and 1988 claims is **AFFIRMED.** The district court's decision in favor of plaintiff that ordinances 66(E) and 25(J) are preempted by federal law is **REVERSED**, and the case is remanded to the district court for proceedings consistent with this opinion. The Federal Aviation Act does not occupy the field of water use regulations in such a way as to preempt the City of Lake Angelus ordinances.

NATHANIEL R. JONES, Circuit Judge, concurring. After numerous attempts at drafting a principled dissent to the majority opinion, I have come to the conclusion

that while it is legally unassailable, the case nevertheless has an unsettling aspect. Due to the solid conclusion reached by Judge Contie for the majority, I concur in the judgment on both the preemption and section 1983 claims.

I write separately, however, to express a concern, even as I agree with the judgment. This case, I fear, may reenforce, as an unintended consequence, the moves to neutralize the appropriate exercise of federal power whenever state and local regulations are at play. History should remind us of the reasons why a strong central government has been deemed essential in our system of federalism.

I am simply not convinced that in this case the regulations cited by Gustafson demonstrate Congressional intent to preempt the local power to designate aircraft landing sites. To the contrary, zoning is one of the few spheres of control the Federal Aviation Act ("FAA") explicitly leaves to local governments. My concern is that some states and localities will use this ruling as a rallying point in their efforts to undermine particular areas of federal control. Far from that, this case must be read narrowly and as acknowledging that Congress excepted only limited areas from federal control when it enacted the FAA. As history has taught us, certain areas of regulation in our country must be left to the control of the national government. The very nature of some subjects implicate federal control. Air traffic must be regulated at the national level. Without uniform equipment specifications, takeoff and landing rules, and safety standards, it would be impossible to operate a national air transportation system.

City of Burbank v. Lockheed Air Terminal provides a telling example of a locality's attempt to undermine the reach of the Federal Aviation Act. In *Burbank*, one locality's curfew on jet aircraft landings threatened to disrupt flying schedules and jeopardize air safety throughout the entire nation. As the Court noted:

> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.

Burbank, 411 U.S. at 639. I reiterate the Court's concern with local governments' ability to interfere with comprehensive federal regulatory programs. The line between permissible local regulation, such as the zoning regulation in this case, and impermissible encroachments on federal power in the name of zoning or other traditional state police power functions, such as protecting citizens health and welfare, is a thin line. Many localities are already eager to test the boundaries, and the courts must be ever mindful of their attempts to do so.

A recent federalism summit held in Cincinnati serves to remind us of those who wish to see power wrenched from the hands of the federal government. At the summit, state legislators, delegates, and observers from thirty-nine states and five nation-wide organizations convened to discuss proposals for "strengthening the states' hands in dealing with the federal government." *See* Dan Balz,

Power Is on States' Agenda; Coalition Seeks to Fight Federal Encroachment on Sovereignty, Wash. Post, Oct. 25, 1995, at A17; Lawrence J. Goodrich, *States Seek to Grab Even More Power from Washington*, Christian Sci. Monitor, Oct. 25, 1995, at 1. Along with devising strategies to transfer certain areas under federal control to the states, conferees at this recent summit suggested proposals for interjecting state lawmakers into national rulemaking processes. *Id.* As this movement gains fervor, I grow more concerned that its proponents are overlooking this country's continued need for a strong national government.

In their charge to shift power from the national government to local governments, so-called states and local rights proponents cannot ignore the advancements in this country that could only have come about through the leadership of our national government. Besides creating an effective and intricate interstate travel system consisting of air, rail, water, and highway travel, our strong national government has shaped this country into a place where all citizens enjoy protections in the areas of voting rights, education, employment discrimination, labor, securities, and environmental protection. A collection of fifty separate governments could never have assured such protections throughout our fifty states.

Although a legal local seaplane landing prohibition may not seem much of a threat to the integrity of our national government, the possibility remains that the next local regulation may not be rooted in an appropriate exercise of local power. I caution that local governments ought to take care in regulating in areas that are subject to broad national control and to consider the advantages of

our national government before attempting to undermine its authority.

ALICE M. BATCHELDER, Circuit Judge, concurring. I write separately only to observe that Judge Jones's separate concurrence serves to remind us how very far we have strayed from the government described by its founders during this nation's birth.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 238 (James Madison) (G. W. Carey & J. McClellan eds., 1990).

If those who meet in the name of federalism seek, as Judge Jones puts it, "to see power wrenched from the hands of the federal government," to devise "strategies to transfer certain areas under federal control to the states," and "suggest[ ] proposals for interjecting state lawmakers into national rulemaking processes," they do so because the national government has usurped that power from the states and the people, to whom it was originally reserved. *Compare* U.S. CONST. art. I, § 8 *with* U.S. CONST. amend X.

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT GUSTAFSON, Lake Angelus
Riparian Property Owner,

Plaintiff,

-vs- Case No: 92 CV 73976 DT
Hon. Paul V. Gadola

CITY OF LAKE ANGELUS, DONALD ALTHOFF, MAYOR OF THE CITY OF LAKE ANGELUS, MICHAEL STEFANI, CHIEF OF LAKE ANGELUS POLICE FORCE,

Defendants.

STEVEN M. CHAIT P33747
Attorney for Plaintiff
1000 Maccabees Center
25800 Northwestern Highway
P.O. Box 222
Southfield, MI 48037-0222
(313) 746-000700 [sic]

JAMES L. HOWLETT P15187
JOHN D. STARAN P35649
Attorneys for Defendant
200 E. Long Lake Road, Ste. 110
Bloomfield Hills, MI 48304
(313) 645-9400

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND A PERMANENT INJUNCTION, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECTION 1983 CLAIMS

GADOLA, District Judge.

Plaintiff Robert Gustafson brings this action against defendants City of Lake Angelus (the "City") and various city officials, alleging violations of federal statutory and constitutional rights. Plaintiff is seeking declaratory and injunctive relief against the enforcement of City ordinances which prohibit the operation of seaplanes on the surface of Lake Angelus. Additionally, plaintiff seeks an award of attorney fees under 42 U.S.C. § 1988 for the alleged violation of his constitutional rights caused by enforcement of the ordinances. Before the court are the parties' cross motions for summary judgment and plaintiff's motions for declaratory judgment and a permanent injunction. For the reasons discussed below, the court will award partial relief to plaintiff.

I. Background Facts

Plaintiff owns a waterfront home on Lake Angelus. He has been certified as a seaplane pilot by the Federal Aviation Administration ("FAA"). Lake Angelus is an inland lake that is approximately one and one-half miles long and three-quarters of a mile wide. The City is a residential community in Oakland County, Michigan,

consisting of about 140 homes. Defendant Donald Althoff is the mayor of the City, and defendant Michael Stefani is its chief of police. The City lies within the airport traffic area and control zone of the FAA air traffic control tower located at the Oakland-Pontiac Airport.

On August 9, 1991, plaintiff landed a rented seaplane on Lake Angelus. He docked and moored the plane at his home on the shore of the lake. Subsequently, a city police officer contacted plaintiff and warned him that he had violated two city ordinances concerning seaplanes. He was warned not to land his seaplane on the lake again. Plaintiff was allegedly in violation of City ordinances 25(J) and 66(E). Ordinance 66(E) is an amendment to the City's zoning ordinance that reads in relevant part as follows:

> 4.10. Nuisances prohibited. Land may not be used for any of the following purposes, all of which are declared to be public nuisances:
>
> E. The mooring, docking, launching, storage, or use of boats, watercraft, and aircraft powered by internal combustion engines, other than conventional inboard motorboats.

Ordinance 25(J) is an amendment to the City's nuisance ordinance and it declared the following to be a nuisance:

> J. The landing upon the lands, waters, or ice surface within the Village of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft or the flying of any such craft in the airspace above the Village of Lake Angelus at an altitude of less than five hundred feet.

After plaintiff was warned not to land his seaplane on the lake, he asked the city council to rescind or modify the ordinances. Apparently in response to plaintiff's efforts, on September 10, 1991, the city council issued a resolution declaring that Ordinances 25(J) and 66(E) were intended to "protect the public health, safety, and general welfare" of the people and property of the City. The council listed "noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water," and "destruction of property values," among others, as ways in which the welfare of the City was protected by the ordinances.

Plaintiff subsequently filed this action, contending that the ordinances are preempted by federal and state law and/or violate his constitutional rights. He is asking the court to: (1) declare that Ordinances 25(J) and 66(E) are void, unenforceable, and unconstitutional pursuant to 28 U.S.C. § 2201; (2) issue a permanent injunction enjoining defendants from enforcing the ordinances; and (3) award costs and attorney fees to plaintiff pursuant to 42 U.S.C. § 1988 for the alleged constitutional violations under 42 U.S.C. § 1983.

Defendants argue that plaintiff lacks standing and that he has not presented an actual controversy to the court. Furthermore, defendants contend that the ordinances are not preempted and are regulations that are rationally related to a legitimate state interest.

The parties are in agreement that there are no genuine issues of material fact and that the case is ready to be decided by the court based on the applicable law.

II. Justiciability

Defendants present multiple theories as to why plaintiff's action is not justiciable. Defendants claim that this case does not involve an "actual controversy" because plaintiff lacks standing and because the dispute is not ripe. The basis for this claim is the fact that no one has ever been arrested or prosecuted under either ordinance. Furthermore, defendants claim that no one has even been warned about the altitude restrictions contained in Ordinance 25(J).

Plaintiff argues that he presents an actual controversy because of the warning issued to him in the summer of 1991. At that time, a city police officer told plaintiff that he was in violation of the ordinances and that he would be arrested if he landed a seaplane on the lake again. Plaintiff was also warned later by other City officials against landing a seaplane on the lake.

In order to have standing,

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citations omitted).

The court finds that plaintiff has met his burden in establishing his standing to sue. Plaintiff has shown that he was threatened with arrest and prosecution. The court will not require plaintiff to get himself arrested and fined in order to address his challenge. It is clear that the threat of prosecution is fairly traceable to the City and its officials who have threatened to enforce the ordinances. Finally, a favorable decision for the plaintiff invalidating and enjoining the ordinances would remove the threat of prosecution hanging over plaintiff's head and allow him to fly and land seaplanes on Lake Angelus.

Plaintiff's claim is also ripe for adjudication. Ripeness, although similar to a challenge to standing, presents different prudential concerns. In order to determine if a claim is ripe, the court must evaluate the hardship to the parties of withholding judicial determination and whether the issues are fit for decision. Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). The hardship to plaintiff is clear. Until a determination of his claim is made, he is prevented by the ordinances from landing a seaplane on the lake. The issues in this case are also fit for determination. Plaintiff presents purely legal issues of preemption which would not be aided by further factual development. See Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F.Supp. 678, 687 (N.D.N.Y.1989). As such, plaintiff's claim is ripe for adjudication by this court.

The court finds that plaintiff has presented an "actual controversy" before this court. The action before the court satisfies the requirements of 28 U.S.C. § 2201(a) and Article III of the Constitution. It is not a "hypothetical" case, as defendants claim, but rather a real controversy

over the enforcement of ordinances that restrict the activities of plaintiff. Therefore, plaintiff's claim is justiciable in this court.

III. Federal Preemption

Article VI of the Constitution declares that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a result, state or local laws that conflict with federal law and regulations are preempted. Malone v. White Motor Corp., 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978).

Federal laws can invalidate local laws in several different ways. First, Congress can preempt state law "by so stating in express terms." Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 712-13, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). Secondly, where Congress has not spoken expressly, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Field preemption can also occur where the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Hillsborough, 471 U.S. at 713, 105 S.Ct. at 2375. "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." Id. A state law conflicts with federal law when compliance with both is a

"physical impossibility" or when state law is an "obstacle" to the objectives of Congress. Id. State or local laws regulating safety matters are favored unless it was the "clear and manifest purpose of Congress" that federal law would supersede the police powers of the state. Rice, 331 U.S. at 230, 67 S.Ct. at 1152.

Plaintiff claims that ordinances 25(J) and 66(E) are preempted by the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C.App. sections 1301-1551, and the applicable regulations issued by the FAA. Because Congress has not expressly spoken on this issue, the court must determine whether the ordinances at issue are preempted under one of the other doctrines governing preemption enunciated by the Supreme Court.

The court finds that the regulations in this area enacted pursuant to the Federal Aviation Act and the dictates of the Act itself, imply that Congress intended that this area be preempted. Section 1508(a) of the Act states: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters." 49 U.S.C.App. section 1508(a). Furthermore, Congress expressly directed the formulation of comprehensive regulations governing aircraft operations. See 49 U.S.C.App. §§ 1348(a) & (c).[1]

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[1] Section 1348(a) reads in relevant part: The Administrator . . . is authorized and directed to develop plans for and formulate policy with respect to the use of navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the

The Supreme Court addressed preemption under the Federal Aviation Act in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). In Burbank, the Court held that the local noise abatement ordinance, enacted pursuant to the city's police powers, was preempted. The Court cited sections 1348(a) & (c) and 1508 in support of its conclusion that Congress intended to give the FAA "broad authority to regulate the use of the navigable airspace, 'in order to insure the safety of aircraft and the efficient utilization of such airspace . . . ' and 'for the protection of persons and property on the ground.' " Id. at 627, 93 S.Ct. at 1856 (quoting sections 1348(a) & (c)). Furthermore, the Court found that the "Federal Aviation Act requires a delicate balance between safety and efficiency and the protection of persons on the ground. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." Id. at 638-39, 93 S.Ct. at 1862 (citation omitted).

Subsequent courts have followed the Supreme Court's guidance in Burbank in determining whether

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safety of aircraft and the efficient utilization of such airspace. 49 U.S.C.App. § 1348(a). Section 1348(c) provides as follows: The Administrator . . . is . . . authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects. Id. § 1348(c).

local ordinances are preempted under the Federal Aviation Act. See United States v. City of Berkeley, 735 F.Supp. 937 (E.D.Mo.1990) (FAA regulations preempt city's building code); Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F.Supp. 678 (N.D.N.Y.1989) (court finds in favor of small airport operators; sections of town ordinance regulating low-flying aircraft, parachute jumping, flight paths, noise, and insurance requirements were preempted); Command Helicopters, Inc. v. City of Chicago, 691 F.Supp. 1148 (N.D.Ill.1988) (court nullifies local ordinance governing loading operations of helicopters); United States v. City of Blue Ash, 487 F.Supp. 135 (S.D.Ohio1978) (court found that city ordinance restricting noise was preempted by federal law); see also Allegheny Airlines, Inc. v. Cedarhurst, 238 F.2d 812 (2d Cir.1956) (village ordinance preventing aircraft from flying over village at less than one thousand feet was unconstitutional).

The Command case is especially persuasive in applying the Supreme Court's guidance in Burbank. In Command, the court found that the Federal Aviation Act and its attendant regulations occupied the field of the regulation of aircraft operations. Command, 691 F.Supp. at 1151. The court found a need for uniformity in the requirements governing the operation of aircraft, thereby avoiding a "substantial negative effect on commerce." Id.

In applying the Supreme Court's holding in Burbank to the circumstances at issue in this case, it is clear that the ordinances are preempted. The FAA has promulgated extensive regulations governing aircraft operations. Part 91 "prescribes rules governing the operation of aircraft . . . within the United States." 14 C.F.R. § 91.1(a). It

provides regulations governing all aspects of the operation of aircraft. Section 91.119 provides:

> Minimum safe altitudes: General
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> . . . .
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

Id. Additionally, section 91.115 regulates the operation of aircraft on the surface of water, providing guidance for the use of seaplanes.[2]

These regulations, along with the Federal Aviation Act, demonstrate congressional intent to preempt local regulations governing flight operations. Ordinance 25(J) prohibits seaplanes from flying in the airspace of the City at less than 500 feet, it also prohibits seaplanes from landing on the lake. Ordinance 66(E) prohibits the operations of a seaplane on the surface of the lake. The court finds that these two sections are preempted by federal

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[2] It provides: Right-of-way rules: Water operations. (a) General. Each person operating an aircraft on the water shall, insofar as possible, keep clear of all vessels and avoid impeding their navigation, and shall give way to any vessel or other aircraft that is given the right- of-way by any rule of this section. Id. § 91.115.

law and regulations. Defendants ask the court to bifurcate the ordinances, separately considering the altitude restriction and the restriction on seaplane operations on the surface of the lake. The court notes, however, that the FAA regulations specifically deal with both aspects of the ordinances. 14 C.F.R. §§ 91.115 & 91.119. Defendants seem willing to give up the altitude restriction, but not the landing portion. The court finds this a distinction without a difference. The FAA provides safety regulations for take-offs, landings, and operations on water, as well as allowable altitudes. The purpose of the City ordinances, taken as a whole, is to prohibit seaplane operations of any kind on the lake or up to 500 feet above the City. This is clearly contrary to the FAA regulations and federal statutes, and thus, the ordinances are preempted.

Defendants cite two cases that concern local ordinances governing seaplanes in support of their position that preemption does not apply in this case.[3] See City of Shreveport v. Conrad, 212 La. 737, 33 So.2d 503 (1947); People v. Altman, 61 Misc.2d 4, 304 N.Y.S.2d 534 (N.Y.Sup.Ct.1969). The court does not find them persuasive. Conrad did not even address preemption and was

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[3] Defendants also cite Blue Sky and Faux-Burhans v. County Comm'rs, 674 F.Supp. 1172 (D.Md.1987), aff'd without opinion, 859 F.2d 149 (4th Cir.1988), cert. denied, 488 U.S. 1042, 109 S.Ct. 869, 102 L.Ed.2d 992 (1989). As already noted, however, the court in Blue Sky invalidated several local ordinances because they were preempted by FAA regulations. Faux-Burhans is also inapplicable because that case involved land use regulations governing the development of land in the construction of an airport. It did not involve ordinances that directly regulated aircraft flight operations as this case does.

decided before Burbank and before the Federal Aviation Act was even enacted. In Altman, a New York court found that a local ordinance prohibiting seaplane landings in a system of channels was not preempted because it was in harmony with a federal statute. Altman, however, was decided before Burbank, and the court did not address the FAA regulations at issue in this case.

The sections of the City ordinances at issue conflict with and are obstacles to FAA regulations. In addition, the comprehensive nature of the federal regulations and laws in the area of flight operations, landings, takeoffs, and water operations indicates that federal law occupies the field. The portion of Ordinances 25(J) and 66(E) restricting the operation of seaplanes is therefore preempted.

Because the court finds that the ordinances are preempted by federal law, the court will not address plaintiff's claim that the ordinances are also preempted by state law.

IV. Constitutional Claims

Plaintiff also presents a claim under 42 U.S.C. § 1983, for violations of his constitutional rights. Even though the court has already decided the case based on federal preemption, the court will address the section 1983 claim in order to determine if plaintiff is deserving of costs and attorney fees under 42 U.S.C. § 1988.

After examining plaintiff's constitutional claims, the court finds that they are without merit. Plaintiff has failed to show that his due process or equal protection rights

were in any way violated.[4] He has made no showing that the ordinances are overbroad, ambiguous, or vague. In addition, defendants have presented multiple rationales supporting the ordinances. The court finds that each of them is rationally related to a legitimate state interest. For these reasons, the court will grant defendants' motion for summary judgment on plaintiff's section 1983 claims.

V. Conclusion

Pursuant to 28 U.S.C. § 2201, the court will declare that those portions of Ordinances 25(J) and 66(E) governing the operation of seaplanes are preempted by federal law. The court will issue a permanent injunction to the extent that plaintiff has prevailed on the merits on his preemption claims. Blue Sky, 711 F.Supp. at 697; 11 Wright & Miller, Federal Practice and Procedure: Civil § 2944, at 398 (1973). Plaintiff has no adequate remedy at law and the balance of equities favors him.[5] Without an injunction, plaintiff would be prevented from operating a seaplane on Lake Angelus or at an altitude below 500

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[4] The court also notes that a section 1983 claim premised on a violation of the supremacy clause through preemption is not cognizable. J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1476-77 (10th Cir.1985); Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir.1983).

[5] The Sixth Circuit set forth the factors to be considered in granting a preliminary injunction in In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir.1985) (success on the merits, irreparable injury, harmful effect to third parties, and public interest). The court will consider these factors in making its determination of whether to grant a permanent injunction in this case.

feet. Third parties will not be harmed by the injunction because anyone operating a seaplane on the lake will have to do so in compliance with FAA safety regulations. Finally, the public interest will be served by the injunction as preemption of these ordinances will guarantee a uniform set of regulations governing aircraft operations. Based on this analysis, the court will order the City and its employees and officials not to enforce the ordinances as described above.

ORDER

Therefore, it is hereby ORDERED that plaintiff's motion for a permanent injunction is GRANTED.

It is further ORDERED that defendants' motion for summary judgment on plaintiff's section 1983 and 1988 claims is GRANTED.

SO ORDERED.

APPENDIX 3

No. 93-2537/2508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GUSTAFSON, Plaintiff-Appellee/ Cross-Appellant, v. CITY OF LAKE ANGELUS, ET AL., Defendants-Appellants/ Cross-Appellees.	)	ORDER (Filed April 3, 1996)

BEFORE: JONES, CONTIE, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

APPENDIX 4

Case No: 93-2537: 93-2508

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed April 15, 1996)

ROBERT GUSTAFSON

Plaintiff-Appellee Cross-Appellant

v.

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force

Defendants – Appellants Cross-Appellees

BEFORE: JONES, CONTIE, AND BATCHELDER; Circuit Judges.

Upon consideration of the motion filed by the appellee-cross-appellant to stay the mandate pending the filing of a Petition for Writ of Certiorari,

It is ORDERED that the motion be, and it hereby is, **GRANTED.** The mandate is stayed for sixty days from this Order unless the Court is advised that the Petition for Writ of Certiorari has been filed.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX 5

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division)

ROBERT GUSTAFSON,

Plaintiff-Appellee/
Cross-Appellant,

-vs-

United States Court of Appeals, No. 93-2508
93-2537

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Defendants-Appellants/
Cross-Appellees,

_____ /

BRIEF OF *AMICUS CURIAE* SEAPLANE PILOTS ASSOCIATION IN SUPPORT OF ROBERT GUSTAFSON

PROOF OF SERVICE

ADDENDUM

PRATT & FRANK, P.C.
BY: DONALD C. FRANK (P32379)
Counsel for *Amicus Curiae*
Seaplane Pilots Association
4151 Okemos Road
Suite 100
Okemos, Michigan 48864-3214

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division)

ROBERT GUSTAFSON,

Plaintiff-Appellee/
Cross-Appellant,

-vs-

United States Court of Appeals, No. 93-2508
93-2537

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Defendants-Appellants/
Cross-Appellees,

_____ /

CORPORATE DISCLOSURE STATEMENT

The Seaplane Pilots Association (SPA) is an association of aviation users, and is not a publicly traded corporation. In addition, SPA does not have any publicly traded subsidiaries or affiliates.

SPA currently has approximately 5,500 members. SPA is a non-profit corporation organized under the laws of New York.

PRATT & FRANK, P.C.

By: _____
DONALD C. FRANK (P32379)
Attorneys for *Amicus Curiae*
Seaplane Pilots Association
4151 Okemos Road, Suite 100
Okemos, Michigan 48864-3214

Dated:

RULE 29 WRITTEN CONSENT REGARDING BRIEF OF *AMICUS CURIAE*

Consent to the filing of this Brief has been granted by both parties and a copy of this agreement has been made a part of the Addendum attached hereto, at Tab "A."

INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* Brief is filed on behalf of the members of SPA. SPA is comprised of active seaplane pilots and seaplane owners in the United States.

The sole issue raised by Defendant-Appellant City of Lake Angelus, *et al* is whether the City of Lake Angelus local ordinances governing the operation of seaplanes on the surface of Lake Angelus are preempted by Federal law.

As the users of seaplanes for both interstate and intrastate commerce as well as for pleasure use, the members of the SPA must have a uniform set of regulations governing aircraft operations, or they will be severely impeded in their ability to conduct their operations.

The ruling of the United States District Court for the Eastern District of Michigan is in line with an abundant list of federal court decisions upholding federal preemption of the Federal Aviation Regulations (FAR) over local ordinances. In the event that the Court's ruling with regard to federal preemption were to be overturned, the members of SPA, and all other operators of seaplanes would find it virtually impossible to operate without the threat of arbitrary, surprise local arrest and criminal prosecution.

Therefore, SPA, as well as all other pilots and operators of seaplanes, have the greatest and most compelling interest in this matter.

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STATEMENT OF ISSUES

The sole issue addressed by the SPA is whether the City of Lake Angelus local ordinances governing the operation of seaplanes on the surface of Lake Angelus are preempted by Federal law. The judgment of the United States District Court for the Eastern District of Michigan holds that the City of Lake Angelus ordinances governing the operation of seaplanes on the surface of Lake Angelus are preempted by Federal law. This Brief is filed in support of Plaintiff Robert Gustafson and in support of the federal District Court's ruling that federal preemption does invalidate the City's local ordinances, which attempt to govern and prohibit the operation of seaplanes on the surface of the lake. This Brief is also intended to demonstrate the importance and the necessity of such a ruling from the standpoint of the users and operators of water based aircraft within the National Aviation System.

WHEREFORE, SPA respectfully requests that the United States Court of Appeals for the Sixth Circuit affirm that portion of the ruling of the District Court, which holds that those portions of ordinances 25(J) and 66(E) of the City of Lake Angelus governing the operation of seaplanes are preempted by federal law.

STATEMENT OF FACTS

Amicus herein hereby adopts the statement of facts of the District Court (R. 33, Memorandum Opinion and Order), and the Counter-Statement of facts of the Plaintiff-Appellee and Cross-Appellant, Robert Gustafson.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

Robert Gustafson filed this action contending that Lake Angelus City ordinances prohibiting seaplane landings are preempted by federal and/or state law and violated his due process and equal protection rights. (R. 11, First Amended Complaint; R. 12, Brief in Support of Plaintiff's First Amended Complaint). The District Court determined the issues on cross motions for summary judgment and plaintiff's motions for declaratory judgment and a permanent injunction. (R. 20, Defendant's Motion for Summary Judgment; R. 24, Plaintiff's Motion for Summary Judgment; R. 28, Plaintiff's Response to Defendants' Motion; R. 29, Defendants' Response to Plaintiff's Motion; R. 30, Plaintiff's Reply to Defendants' Response). The Court awarded partial relief to plaintiff, finding that the challenged ordinances are preempted by federal law. (R. 33, Memorandum Opinion and Order; R. 32, Judgment).

ARGUMENT

I. ABSENT A UNIFORM SET OF REGULATIONS GOVERNING AVIATION AND AIRCRAFT OPERATIONS, IT WOULD BE VIRTUALLY IMPOSSIBLE TO OPERATE AIRCRAFT IN THE NATIONAL AVIATION SYSTEM, AND THIS IS ESPECIALLY TRUE WITH REGARD TO THE OPERATION OF SEAPLANES

In the Memorandum Opinion and Order granting Plaintiff's motions in this matter, District Court Judge Paul V. Gadola stated:

> "Finally, the public interest will be served by the injunction as preemption of these ordinances will guarantee a uniform set of regulations governing aircraft operations."

(R. 33, Memorandum Opinion and Order at p.. 14).

Nowhere in aviation is the need for a rational, uniform set of regulations more absolutely necessary than to the operators and pilots of seaplanes and amphibious aircraft.

The pilot of a land based aircraft, when flying over an airport, will observe the existence of one or more runways. In the case of a non-controlled airport, (an airport which does not have a control tower), a pilot may elect to land on the runway. In the event that the airport or a runway is not active and has been closed, the Federal Aviation Regulations (FARs) provide for the marking of the runway with large yellow "X"s to indicate to pilots that the runway is not available for landing.

In addition, land based runways in the United States are generally marked on FAA aeronautical charts for the

benefit of the pilot. However, there are virtually hundreds of lakes in many states, such as Michigan, and most aeronautical charts depict a picture of the lake, however, the charts do not identify the lake by name. In addition, in the State of Michigan, virtually all of the lakes which are of sufficient size to operate seaplanes have no restrictions with regard to seaplane operations. The waters of the State of Michigan so far as the water is capable of being owned, belongs to the state, which holds it for the common benefit of all the people. *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926). Obviously, it is not feasible for these lakes to have floating yellow Xs on the lakes in the event that some local municipality wished to prohibit seaplane operations. In addition, it is not feasible to place signs around the lake to advise seaplane pilots of local regulations, since these signs would not be readable by the seaplane pilot. Thus, the sole and only method of notifying operators of seaplanes is through the logical and central Federal Aviation Administration (FAA), through its rules and central publications.

The United States Department of Transportation (DOT), through its agency, the FA [sic], has sole responsibility for the adoption of any air traffic or aviation regulations in the United States. Neither states nor local governments may regulate any federally preempted area. Case law fully supports federal preemption of ordinances affecting aircraft operations. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Alleghany Airlines v. Village of Cederhurst*, 238 F.2d 812 (2nd Cir. 1956); *American Airlines v. Town of Hempstead*, 398 F.2d 369 (2nd Cir. 1968), cert. den. 393 U.S. 1017 (1969); *American Airlines v. City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), aff'd 407

F.2d 1306 (16th Cir. 1969), cert den 396 U.S. 845 (1969); *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002, 1010 (2nd Cir. 1977).

Common sense, of course, requires that exclusive control of aircraft operations be concentrated at the national level, and communities are therefore preempted from attempting to regulate planes in flight. *United States v. City of Blue Ash*, 487 F. Supp. 135 (S.D. Ohio 1978), aff'd 621 F.2d 227 (6th Cir. 1980). In addition, *City of Burbank, supra*, requires that a municipal ordinance resting on police power, which manages or dictates action by aircraft in navigable airspace for the purpose of noise control, is invalid under the preemption doctrine.

The operation of seaplanes upon the surface of any navigable water within the United States is governed by Federal Aviation Regulation 14 C.F.R. 91.115. (Copy attached in Appendix at Tab "B"). Additional regulation for night mooring is contained in 14 C.F.R. 91.209(c). (Copy attached in Appendix at Tab "C"). Clearly, the federal government has established pervasive regulatory control over aircraft, seaplanes, and their operation.

Obviously, if every local governmental body was permitted to regulate, control and prohibit the flying of national air traffic through its small piece of real estate, or waters, it would become literally impossible for aircraft to navigate, or to participate in interstate commerce, in the National Air System (NAS). Each aircraft would be required to navigate through an endless morass of quilt-like patch work bits and pieces of prohibited air space. Our aviation system as we know it could not exist under

those circumstances. This is especially significant to seaplane operation, which is extremely critical to interstate and intrastate commerce in many areas, such as Louisiana and Alaska.

A. THE FEDERAL AVIATION ADMINISTRATION (FAA) THROUGH IT'S [sic] REGULATIONS HAS ESTABLISHED COMPLETE AND PERVASIVE CONTROL OF ALL AVIATION SEAPLANE ACTIVITIES

Through the enabling statutes contained in the Federal Aviation Act of 1958, the Administrator of the FAA has promulgated comprehensive regulations and control over virtually every aspect of aircraft and seaplane operation. An applicant for an FAA pilot certificate must first complete an examination by an FAA appointed Aviation Medical Examiner (AME). Prior to soloing any aircraft for the first time, the applicant for a pilot certificate must be examined and obtain an FAA airman medical certificate to ensure that the airman meets the rigorous standards required by the FAA of all pilots. 14 C.F.R. 67 *et seq.*

The applicant for a pilot certificate must then undergo training, testing and the issuance of an FAA pilot certificate prior to serving as pilot in command of any United States registered aircraft. This includes both written examination and practical flight testing. 14 C.F.R. 61 *et seq.*

In addition, the applicant for an additional seaplane rating on their pilot certificate, must take and complete additional mandatory training, testing and issuance by

the FAA of a specific seaplane rating. 14 C.F.R. 61.61 *et seq.*

Any manufacturer which wishes to design and manufacture any aircraft, seaplane, amphibian aircraft or component such as seaplane floats, must go through rigorous FAA certification, design and licensing of each make and model of equipment. These new products may not be licensed, sold or flown in the United States without complying with these rigorous FAA standards and testing requirements. 14 C.F.R. 23 & 25 *et seq.*

Each and every individual who wishes to maintain and service an airplane, seaplane, amphibious aircraft, or components must take required FAA training, testing including written testing and practical hands on testing and must obtain FAA Air-frame and Power-plant mechanics certificates prior to maintaining or servicing these aircraft. 14 C.F.R. 43 *et seq.* Finally, the FAA through its promulgation of safety regulations dictates exactly how a pilot shall operate an aircraft, whether land based or water based, and all operators of aircraft and seaplanes must do so in compliance with FAA safety regulations. *See e.g.,* 14 C.F.R. 91.115; (R. 33, Memorandum Opinion and Order at p. 14).

B. ALL AIRCRAFT AND SEAPLANE PILOTS AND OPERATORS REQUIRE A UNIFORM SET OF REGULATIONS GOVERNING AVIATION

As indicated *supra,* the operators of seaplanes and amphibious aircraft could not operate waterborne aircraft in the event that every one of the tens of thousands of

local communities could preempt Federal Aviation Regulations, and arbitrarily arrest and criminally prosecute each and every seaplane operator who was to utilize the surface of a lake. Clearly, the FAA has an absolute and pervasive control of all matters regulating the conduct and operation of aviation in the United States. In addition to the pervasive set of controls listed previously, the FAA *uniquely has the expertise* regarding what parameters and criteria are required in the physical layout of a lake to make it safe for seaplane operations. If each local community were permitted to substitute its own ideas of what constitutes "safety", there would be as many different standards for safety as there are local communities throughout the United States. It would then be impossible for any given seaplane operator to know and comply with standard safety requirements, which would make each and every pilot potentially liable for arrest and criminal prosecution every time the pilot operates the aircraft off a body of water. The courts have made clear that the Federal Aviation Regulations require a delicate balance between reasonable safety and inconvenience to those on the surface, in order to serve the public policy of an efficient National Air System, and that Congress has clearly delegated the *duty of safety of persons on the ground and in the air to the FAA. Burbank, supra; Command Helicopters, Inc. v. City of Chicago,* 691 F. Supp. 1148 (N.D. Ill. 1988).

C. THERE IS NO LEGITIMATE HEALTH, SAFETY OR WELFARE REASON FOR THE PROHIBITION OF SEAPLANE OPERATIONS AT LAKE ANGELUS

The facts surrounding the instant case provide a good example of discriminatory, arbitrary local criminal regulation. At Lake Angelus, the local ordinances prohibiting seaplanes were put into effect in approximately 1972, for reasons having nothing to do with the health, safety or welfare of the community. Discovery in this case has shown that the ordinances were established on an arbitrary, whimsical and capricious discriminatory nuisance basis, while permitting much more powerful and noisier water ski boats, etc. to operate on the lake for hours at a time. (R. 56, Deposition of Donald Althoff; R. 55, Deposition of Michael Stefani; R. 24, Plaintiff's Motion for Summary Judgment, Exhibit "D") Even 65 horse power, extremely quiet seaplanes such as the Piper J-3 Cub were prohibited. Obviously, there was no logical noise related prohibition of the seaplanes, since the community did and still does permit much noisier uses on the lake.

Safety can play no part in the community's prohibition of seaplanes, since both the Mayor and the Chief of Police at their depositions testified that no studies had ever been conducted by the City of Lake Angelus regarding seaplane safety, statistics, safety as between boats and seaplanes, etc. (R. 56, Deposition of Donald Althoff; R. 55, Deposition of Michael Stefani). Also, noise and safety concerns have clearly been reserved to the FAA as to aircraft and people on the ground. *Burbank, supra; Command Helicopters, Inc., supra.*

Obviously, environmental concerns played no part, since the Mayor and the Chief of Police of Lake Angelus both testified that there are absolutely no mandatory procedures in place to prevent the introduction of zebra mussels into the lake from boats which are regularly launched on Lake Angelus (or even on the feathers of ducks or geese). In addition, the Mayor and Chief of Police also testified that no testing has ever been done to determine whether, in fact, there *are already* zebra mussels residing in Lake Angelus. (R. 56, Deposition of Donald Althoff; R. 55, Deposition of Michael Stefani). The Michigan DNR has determined that zebra mussels are likely to ultimately spread to *all* Michigan inland lakes. (R. 52, Supplemental Affidavit of Expert John Schwartz). Finally, zebra mussels have only been known in the Great Lakes in the last several years, and back in 1972 when the seaplane prohibition was enacted, the community could not have had those concerns. Indeed, the city only passed its resolution stating that "health, safety and welfare of its citizens" was a factor in the seaplane prohibition subsequent to the decisions of *Square Lake Condominium v. Bloomfield Township*, 437 Mich. 310; 471 NW2d 321 (1991) and *Hess v. Township of West Bloomfield*, 439 Mich. 550; 486 NW2d 628 (1992) after those cases came down utilizing the "health, safety and welfare" language (and these cases have nothing to do with aviation, seaplanes or federal preemption).

In addition, the unenforceable nature of these local ordinances can be seen in the Lake Angelus factual scenario as well. Until the United States District Court entered its judgment permanently enjoining Lake Angelus from enforcing those portions of the City of Lake

Angelus ordinances governing the operation of seaplanes, not even the Chief of Police of the City of Lake Angelus was aware that these ordinances prohibited the operation of aircraft at or below 500 feet above Lake Angelus, notwithstanding the fact that this air space is contained within the Airport Traffic Area and Control Zone of the FAA air traffic control tower located at Oakland Pontiac Airport, less than five miles from Lake Angelus. (R. 55, Deposition of Michael Stefani). This is a *criminal ordinance* which is punishable by *30 days in jail* for each occurrence, and not even the Chief of Police had ever heard of this ordinance, let alone pilots operating aircraft either on and off of the many lakes in the area, *or* aircraft approaching or departing the Oakland Pontiac Airport.

The *sole and only investigation* which the City of Lake Angelus conducted in this matter, was to contact the Michigan Bureau of Aeronautics, and requested that the Bureau of Aeronautics issue its own regulation prohibiting the operation of seaplanes at Lake Angelus. After making a thorough inspection of the lake, the *Michigan Bureau of Aeronautics* wrote to the City stating that *there are no safety or airspace reasons* to prohibit seaplane operations on Lake Angelus. (R. 24. Plaintiff's Motion to Rule 56 Summary Judgment, Exhibit "D").

D. CONTRARY TO THE POSITION OF THE CITY OF LAKE ANGELUS, THE MENTION OF THE LAKE ANGELUS CRIMINAL ORDINANCE IN THE AIRPORT/FACILITY DIRECTORY EXPRESSLY IS NOT A STATEMENT BY THE FAA THAT THE ORDINANCES ARE VALID

The City of Lake Angelus has pointed to the fact that the FAA *Airport/Facility Directory* contains language in the Airport Remarks section for Oakland Pontiac Airport stating the following: "Seaplane LDGS and take offs on Lake Angelus 4.5 miles ENE is prohibited by local ordinance." The City's implication *that this inclusion means that the FAA concurs that the ordinance is valid has been expressly denied by the FAA.* (Declaration of Brenda Hawkins, FAA Office of Air Traffic System Management, Addendum at Tab "D"). The FAA simply does not wish for its airmen to be blind-sided, arrested and charged with criminal prosecution where it knows that such threats have been made.

What counsel for the City of Lake Angelus does not understand is that the *Airport/Facility Directory* is a non-mandatory reference which is utilized primarily by pilots of aircraft which are traveling cross country on instrument flight plans. This directory is one of a number of publications which contains the radio frequencies, types of instrument approaches, and other electronic aids which are available at a large terminal airport.

Most seaplanes are not operated under instrument flight rules for travel to airport terminals. Rather, the majority of seaplanes have very few navigation radios, since aviation electronics are very expensive, sensitive,

and are susceptible to damage if exposed to a lot of water. In addition, there are no instrument landing system approaches to lakes, and therefore seaplane operations are generally limited to sunny days when the weather is clear.

Finally, a seaplane pilot flying to Lake Angelus is unlikely to be interested in landing at Oakland Pontiac Airport, and would have no reason to be consulting the optional *Airport/Facility Directory* to determine the various instrument approaches and services at the Oakland Pontiac Airport. Therefore, most seaplane pilots would still have no notice of Lake Angelus' local ordinances, or the ordinances of any other local municipality.

E. THE RULING OF THE DISTRICT COURT WHICH PREEMPTS THE LOCAL ORDINANCES, DOES NOT IN ANY WAY SUBJECT LAKE ANGELUS TO UNREGULATED ACTIVITY

It is important for the Court to understand that a seaplane pilot approaching a lake *must comply with FAA safety regulations* which require a very cautious survey of the entire lake to determine matters such as wind direction, number of boats and other traffic at the lake. The regulations require the pilot to give the right-of-way to other aircraft and vessels and to land on the surface of the water only when it is clearly safe to do so.

A *pilot viewing the lake from the air has a unique perspective* from which to observe any congestion, boaters or swimmers on the lake, and to determine whether a safe landing can be effected. In the case of Lake Angelus, there is no public launching, and even on the busiest

days, there is comparatively light boat traffic. In addition, on this particular lake boaters have established a left hand pattern around the lake to avoid conflicts. (R. 24, Plaintiff's Motion for Summary Judgment, Exhibit "D").

Lake Angelus is an extremely large lake, and offers far more space than many other Michigan lakes which safely handle seaplane operations. The duration of noise emitted by a seaplane taking off is much shorter than that emitted by a boat limited to the surface of the water, and in fact, many seaplanes are quieter than the boats currently operating upon Lake Angelus' waters. Safety is less of a concern with seaplanes than with boats, since no special FAA training or ratings are required before operation of boats. In addition, many boat operators consume beer or other alcoholic beverages while operating their boats, which is *strictly prohibited by FAA safety regulations* for seaplane pilots.

Lake Angelus is such a large lake, and configured such that it is ideal for the operation of seaplanes. The lake is configured such that the east-west portion of the lake is approximately one and one-half miles long, and most seaplanes can be off the water in less than 500 feet on take off. In addition, the lake has clear zones on either end of the lake which permits an approach and departure lane that will ensure that no seaplane ever has to fly over any resident's home on the lake shore. In addition, due to the length of the lake, an aircraft can climb in such a manner that by the time the aircraft comes over the far shoreline on the departure end of the lake, aircraft will be well above the 500 foot limit even contemplated by the now preempted ordinances. *These factors are clearly a basis for the determination of the Michigan Bureau of Aeronautics*

that the Lake is appropriate for seaplane operation. (R. 24, Plaintiff's Motion for Summary Judgment, Exhibit "D").

Indeed, virtually every other appropriate size lake in the State of Michigan have [sic] no seaplane prohibitions, which is a strong indicator that these types of uses are not, in fact, either public nuisances nor a threat to the reasonable health, safety and welfare of the community. In addition, the City of Lake Angelus has stated without any sort of research, backup or proof that the operation of seaplanes could hurt property resale values. Some of the *most prestigious lakes* in the southeastern Michigan area, such as Orchard Lake and Pine Lake routinely experience seaplane operations, and each of these lakes is dotted with million dollar homes.

The waters of the State of Michigan so far as the water is capable of being owned, belongs to the state, which holds it for the common benefit of all the people. *Collins v. Gerhardt, supra.* Therefore, the City of Lake Angelus, even under state law, is not the owner of the surface of the water, the fish in the lake, or the right to the enjoyment thereof.

A seaplane in the water has no more environmental effect than would two canoes setting in the same water. A seaplane does not have an oily engine or propellers in the water as do boats. (R. 53, Affidavit of Vincent Scarpuzza).

Finally, the City of Lake Angelus is located only 4.5 statute miles from the Oakland Pontiac Airport, which is regularly the second busiest airport in the State of Michigan. As a result, the residents of the City of Lake Angelus chose to build their homes in an area where low flying aircraft either departing or arriving at Oakland Pontiac

Airport regularly fly low over their homes. Although the number of seaplanes in southeastern Michigan is very small, and the City of Lake Angelus will probably never see more than one seaplane at a time, the imagined increase in danger of an airplane accident within the City of Lake Angelus due to seaplane operations is illusory.

F. THE RULING OF DISTRICT JUDGE PAUL V. GADOLA IS SIMPLY ONE MORE IN A LONG LINE OF OPINIONS REAFFIRMING THAT FEDERAL LAW PREEMPTS LOCAL AVIATION OPERATIONAL ORDINANCES, AND SIMPLY RETAINS THE STATUS QUO

There should be no misunderstanding by the Court: the finding of federal preemption does not in any way relieve seaplane pilots of their duty to operate pursuant to FAA safety regulations. (R. 33, Memorandum Opinion and Order at pp. 13-14). Indeed, if there are any valid or legitimate problems concerning the health, safety or welfare of the citizens of Lake Angelus, the City need only request that the FAA review the problem if one exists. Neither Plaintiff Robert Gustafson nor this *Amicus* would take the position that we should go back to the "days of the wild west" where there was no regulation of any kind, and every person strapped a gun to their side to enforce the law. Indeed, *the ruling of the District Court with regard to federal preemption simply retains the status quo, and leaves in the hands of one central, federal authority the pervasive, extensive and complete control of aviation regulation and operation in the United States.* There are numerous and compelling reasons which have been enumerated by the courts as to why our national, interstate aviation system could not function unless the control of the National Air

System was placed in the hands of the federal government. *Burbank, supra; Command Helicopters, supra.*

CONCLUSION

The current system provides a fair and necessary balance between the need for air transportation and the needs of the local municipalities. *Burbank, supra.* In the event that local municipalities feel that they need additional regulations, they are free to take the matter up with the impartial Federal Aviation Administration. This will further ensure fairness for all parties by keeping the impartial FAA involved, which will avoid improper or arbitrary prohibitions, such as the Lake Angelus ordinances found in this case.

WHEREFORE, *Amicus Curiae* Seaplane Pilots Association respectfully requests that the Court of Appeals for the Sixth Circuit affirm that portion of the ruling of the District Court, which holds that the City of Lake Angelus' ordinances governing the operation of seaplanes on the surface of Lake Angelus are preempted by federal law.

Respectfully Submitted,

PRATT & FRANK, P.C.

By: _____

DONALD C. FRANK
(P32379)
Attorneys for *Amicus Curiae*
Seaplane Pilots Association
4151 Okemos Road
Suite 100
Okemos, Michigan 48864-3214

Dated:

_____

APPENDIX 6

[LOGO]
U.S. Department
of Transportation

Federal Aviation
Administration

Flight Standards District Office
1800 NE 25th Ave. Suite 15
Hillsboro, Oregon 97124
Phone: (503) 681-5500

November 17, 1994

Ms. Kathryn Silva
Office of Legislative Counsel
Salem, OR 97310

Dear Ms. Silva:

I have reviewed the proposed state legislation governing the operation of seaplanes in Oregon State waterways. I am concerned that you state you wish to adopt rules governing seaplane safety in operations on state waters. The Federal Aviation Administration (FAA) has already adopted uniform regulations to govern the safe operation of aircraft, including the operation of seaplanes, throughout the United States which are codified at 14 C.F.R. Part 91. Section 91.115 of that part applies specifically to seaplane operations.

You can imagine the conflicts which would occur if each state were to adopt their own different rules. The very mobile nature of aviation makes it vitally important that all laws governing aviation be uniform throughout the United States. Pilots would find it difficult to utilize the advantage of their aircraft in air commerce due to the

bewildering number of laws they would be required to know.

Because of this, in enacting the Federal Aviation Act of 1958, Congress provided for a single set of regulatory standards governing the safety of aircraft operations. Judicial decisions fully support federal preemption in this area. See *Allegheny Airlines v. Village of Cedarhurst,* 238 F.2d. 812 (2nd Cir. 1956), *American Airlines v. City of Audobon Park,* 297 F. Supp. 207 (W.D. Ky. 1968) *aff'd* 407 F.2d. 1306 (6th Cir. 1969), *cert. denied,* 396 U.S. 845, and *American Airlines v. Town of Hepstead,* 398 F.2d. 369 (1968), *cert. denied,* 393 U.S. 1017 (1969). In these cases, the courts focused upon the comprehensive nature of the FAA's regulatory scheme and determined that fractionalized and nonuniform control over aeronautical activity would severely limit the ability of the FAA to carry out its mandate. As noted by the U.S. Supreme Court in *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944), "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by Federal permission, subject to Federal inspection, in the hands of Federally certified personnel and under an intricate system of Federal commands." *Id* at 303.

While I recognize that the proposed legislation does not itself regulate seaplane operations, but merely authorizes the promulgation of such regulations by a state agency, the fact remains that this regulatory activity is a preempted one, with jurisdiction vested exclusively in the Federal Aviation Administration.

I appreciate the opportunity you have provided me to comment on this proposal. I have consulted with Mr.

George Thompson, Assistant Chief Counsel ANM-7 in formulating this response. I look forward to working with you on issues affecting aviation.

Sincerely,

/s/ Steven
Steven G. Albert
Principal Operations Inspector

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

(On Appeal from the United States District Court for the Eastern District of Michigan, Southern District)

ROBERT GUSTAFSON, Plaintiff-Appellee Cross-Appellant, v. CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force Defendants-Appellants Cross-Appellees	United States Court of Appeals, No. 93-2508, 93-2537

DECLARATION OF BRENDA HAWKINS

I, Brenda Hawkins, do hereby state as follows:

1. I am the Acting Assistant Manager of Operations, National Flight Data Center (ATM-610), under the Office of Air Traffic System Management, Federal Aviation Administration (FAA). I have held this position for two months. I have been employed by the FAA for 21 years and nine months.

2. In this position, I am responsible for developing policy on assigned programs and projects relating to aeronautical information services and air cartographic matters, including the Airport Facility Directory (AFD). I provide policy and/or technical guidance and advice to staff, the program manager, other FAA offices, other government agencies, chart producers, and other persons outside the government.

3. The National Flight Data Center, part of the Office of the Associate Administrator for Air Traffic, is responsible for maintaining the FAA data base and providing this data to government and private industry producers of aeronautical charts and publications, including the AFD. Our primary sources of airport information are the owner/operator of the airport and FAA/State inspectors. This data is validated in conjunction with FAA Order 5010.4, Airport Safety Data Program. If complete and in accordance with the Order, it is deemed reliable and published accordingly.

4. The language concerning the Lake Angelus seaplane prohibition in the Airport Remarks section of the Oakland-Pontiac Airport entry in the FAA's AFD, East Central U.S., is not intended as a statement that the ordinance is valid or enforceable, but merely as a report to the users of the Directory that an ordinance exists.

5. The FAA will include a local ordinance in the Directory so that pilots will know of the ordinance and not be surprised if it is enforced. The National Flight Data Center does not verify or question the authority of a given local government or airport to enact such an ordinance.

6. On March 22, 1994, my office received a written request to delete the language referring to the ordinance from the next edition of the AFD to be published on April 28, 1994. Since it did not come from a normal source (airport owner/operator), my office contacted the Oakland-Pontiac Airport Manager to confirm the request. Mr. Karl Randall, the Airport Manager, agreed that the language referring to the ordinance should be deleted and promised to confirm that in writing. As a result, the April 28, 1994, edition of the AFD will not include the ordinance language.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: March 22, 1994

Brenda Hawkins

APPENDIX 7

* * *

"There are only two places in the world I would live, and one of them is Lake Angelus. THIS IS STILL THE NORTHWEST CORNER OF HEAVEN!"

These words were spoken by Austin Bement, a highly respected and long time resident of Lake Angelus. He owned the Tan home and used to park his pontoon glider on the point across from the mouth of the canal. He also owned the third Beaver Boat on the lake. A light mahogany constructed boat with a hopped up four cylinder Model A engine for power. He needed something fast enough to get the glider off the water. There were also other seaplanes that used the lake, two in particular visited almost every Sunday during the summer months. In fact, did you know that in 1946 the Village Council passed Ordinance No. 12 to regulate the operation of aircraft in the Village of Lake Angelus and to license operators of these aircraft. Apparently, they didn't feel seaplanes were a nuisance or a safety hazard.

Austin Bement's words are often used to symbolize the peace and tranquility of the lake or to stress a point of preserving what our founding fathers created. I believe he spoke these words to express the freedom he felt living in a community relatively unrestricted and "doing what made him happy", such as landing his glider on the lake or racing automobiles on the ice. The following passage printed in "A Short History of Lake Angelus, Michigan" is an example of what could have made him feel this way. "Local government was used to solve problems peculiar to the community. Among the problems

was the regulation of water craft on the lake (Ordinance No. 18) . . . *The ordinance was observed probably more as a measure of pride and courtesy than because of the legal compulsion in which it was clothed.* The residents saw nothing to be proud of in flaunting their own ordinances or in finding "angles" or evasions. *If they disagreed with the action taken by the Commission, they had the maturity and the self-respect to face the Commission and make their objections known. With such an attitude, it was possible to follow a policy of not using the power of governments to arrest or harass our own residents. . . . "*

Fortunately, Austin Bement is not alive today to witness the destruction of his "Heaven". During the past few years, many citizens have been subjected to public humiliation whenever they've disagreed with the actions taken by the Council. Others have been attacked behind their backs. Questionable ordinances have been passed regulating activities which possibly deny citizens their constitutional right of freedom to use property, sometimes their own, within the city. Police harassment has taken place on our water and roads. Neighbors are slandering other neighbors and even arrests are being threatened.

Pride and courtesy no longer exist for many in Lake Angelus. People are becoming irritated with the Councils attitude towards them and with their selective ordinance enforcement. They're starting to challenge the rules and regulations because they're tired of being "jerked" around. The Council has to recognize this is the Nineties and people are not afraid to stand up for what they believe.

Many of us have known from the beginning that some of our ordinances are unconstitutional and have only abided by them out of respect for our neighbors. What respect has the Council shown the Gustafsons? As much as I would hate to see my tax dollars go to the lawyers, I'd like nothing better than to see the Gustafsons win in court. This would prove to the Council they're not omnipotent and hopefully they'll realize how far our city has come from the "CORNER OF HEAVEN" that Austin Bement enjoyed.

Sincerely,

/s/ Mary Mrsan
Mary Mrsan

APPENDIX 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT GUSTAFSON, Lake Angelus
Riparian Property Owner,

Plaintiff,

-vs-

Case No: 92 CV 73976 DT
Hon. Paul V. Gadola

CITY OF LAKE ANGELUS, DONALD ALTHOFF, MAYOR OF THE CITY OF LAKE ANGELUS, MICHAEL STEFANI, CHIEF OF LAKE ANGELUS POLICE FORCE,

Defendants.

STEVEN M. CHAIT P33747
Attorney for Plaintiff
1000 Maccabees Center
25800 Northwestern Highway
P.O. Box 222
Southfield, MI 48037-0222
(313) 746-000700 [sic]

JAMES L. HOWLETT P15187
JOHN D. STARAN P35649
Attorneys for Defendant
200 E. Long Lake Road, Ste. 110
Bloomfield Hills, MI 48304
(313) 645-9400

AFFIDAVIT OF KYLE KIEFLING

(Filed Dec. 27, 1993)

State of Michigan)
) SS
County of Oakland)

KYLE KIEFLING, being first duly sworn, deposes and states the following:

1. That I am employed by the Federal Aviation Administration (FAA) as the Tower Manager of the FAA Air Traffic Control Tower located at the Oakland Pontiac Airport, and have held that position for fourteen (14) years.

2. That I am familiar with Lake Angelus, which underlies the Airport Traffic Area (ATA) and Control Zone of the Oakland Pontiac Airport.

3. That I am aware that the City of Lake Angelus has an ordinance prohibiting the operation of seaplanes on the lake, which information is reported in the FAA Facility Directory.

4. That I have never been aware, until advised by the attorneys in this lawsuit, that the City of Lake Angelus ordinances also prohibit the operation of any type of aircraft in the airspace at or below 500 feet over the City of Lake Angelus.

5. That during normal flight operations at Oakland Pontiac Airport, aircraft operating pursuant to the Federal Aviation Regulations, may have in the past been required for flight safety to fly through the airspace

within the Airport Traffic Area and above the City of Lake Angelus at or below 500 feet.

6. That several seaplanes are based on lakes such as Oakland Lake, Pontiac Lake, and Oxbow Lake within the Oakland Pontiac Airport Traffic Area. Air traffic personnel at Oakland Pontiac Air Traffic Control Tower have coordinated seaplanes using the lakes with traffic using Oakland Pontiac Airport.

7. I make this Affidavit on personal knowledge, and if sworn as a witness, I can testify competently to the facts stated herein.

Further deponent saith not.

/s/ Kyle Kiefling
KYLE KIEFLING

Subscribed and sworn to before me
this 18th day of October, 1993.

/s/ Donna A. Curiak
NOTARY PUBLIC

Oakland County, Michigan
My commission expires: 9-9-95

APPENDIX 9

Exhibit D

STATE OF MICHIGAN

(LOGO)

JOHN ENGLER, GOVERNOR

DEPARTMENT OF TRANSPORTATION
CAPITAL CITY AIRPORT, LANSING, MICHIGAN 48906
PHONE (517) 373-1834 FAX NO. (517) 685-8388

PATRICK M. NOWAK, DIRECTOR
July 10, 1991

James L. Howlett
Beier Howlett, PC
200 East Long Lake Road, Suite 110
Bloomfield Hills, Michigan 48304-2361

Dear Mr. Howlett:

Mr. Gehman asked me to respond to your letter of June 13, 1991 concerning prohibition of seaplanes from Lake Angelus.

I have reviewed the resolution passed by the Lake Angelus City Council on June 10, 1991. On July 5, 1991 I personally looked at the lake. I saw no factor which would prevent a properly experienced and certificated pilot in an appropriate aircraft safely taking off or landing on Lake Angelus. I understand boaters have established a left hand pattern around the island in the lake to avoid conflicts. A locally based seaplane pilot would have no difficulty in knowing and conforming to the local boating rules.

Several seaplanes are based on lakes such as Oakland Lake, Pontiac Lake and Oxbow Lake within the Pontiac Airport Traffic Area. Air traffic control personnel at Pontiac Airport Control Tower told me they have no problem coordinating seaplanes using the lakes with traffic using Pontiac Airport.

My determination is there is no significant aviation safety or airspace basis to exclude seaplanes from Angelus Lake. I advised Mr. Gehman that the information I obtained does not warrant action by the Aeronautics Commission to prohibit or regulate the use of Lake Angelus by seaplanes.

If we can provide further clarification or help in resolving your local aviation issue, please let me know.

Sincerely,

/s/ James T. Greshel
James T. Greshel, Administrator
Safety & Services Division
BUREAU OF AERONAUTICS

APPENDIX 10

14 CFR s 157.1
14 C.F.R. s 157.1

CODE OF FEDERAL REGULATIONS
TITLE 14 - AERONAUTICS AND SPACE
CHAPTER I - FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER I - AIRPORTS
PART 157 - NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS

Titles 1-35 current through November 30, 1995; 60 FR 61644 Titles 36-50 current through January 1, 1996; 60 FR 67518 Title 26 current through January 1, 1996; 60 FR 67518

s 157.1 Applicability.

This part applies to persons proposing to construct, alter, activate, or deactivate a civil or joint-use (civil/military) airport or to alter the status or use of such an airport. Requirements for persons to notify the Administrator concerning certain airport activities are prescribed in this part. This part does not apply to projects involving:

(a) An airport subject to conditions of a Federal agreement that requires an approved current airport layout plan to be on file with the Federal Aviation Administration; or

(b) An airport at which flight operations will be conducted under visual flight rules (VFR) and which is used or intended to be used for a period of less than 30

consecutive days with no more than 10 operations per day.

(c) The intermittent use of a site that is not an established airport, which is used or intended to be used for less than one year and at which flight operations will be conducted only under VFR. For the purposes of this part, intermittent use of a site means:

(1) The site is used or is intended to be used for no more than 3 days in any one week; and

(2) No more than 10 operations will be conducted in any one day at that site.

<< PART 157 – NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS >>

Authority: Secs. 309, 313(a), 314, 72 Stat. 751; 40 U.S.C. 1350, 1354(a), 1355.

Source: 56 FR 33996, July 24, 1991, unless otherwise noted.

14 C.F.R. s 157.1

14 CFR s 157.1

END OF DOCUMENT

14 CFR s 157.2
14 C.F.R. s 157.2

CODE OF FEDERAL REGULATIONS
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Titles 1-35 current through November 30, 1995; 60 FR 61644 Titles 36-50 current through January 1, 1996; 60 FR 67518 Title 26 current through January 1, 1996; 60 FR 67518

s 157.2 Definition of terms.

For the purpose of this part:

Airport means any airport, heliport, helistop, vertiport, glideport, seaplane base, ultralight flightpark, manned balloon launching facility, or other aircraft landing or takeoff area.

Heliport means any landing or takeoff area intended for use by helicopters or other rotary wing type aircraft capable of vertical takeoff and landing profiles.

Private use means available for use by the owner only or by the owner and other persons authorized by the owner.

Private use of public lands means that the landing and takeoff area of the proposed airport is publicly owned and the proponent is a non-government entity, regardless of whether that landing and takeoff area is on

land or on water and whether the controlling entity be local, State, or Federal Government.

Public use means available for use by the general public without a requirement for prior approval of the owner or operator.

Traffic pattern means the traffic flow that is prescribed for aircraft landing or taking off from an airport, including departure and arrival procedures utilized within a 5-mile radius of the airport for ingress, egress, and noise abatement.

<< PART 157 – NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS >>

Authority: Secs. 309, 313(a), 314, 72 Stat. 751; 49 U.S.C. 1350, 1354(a), 1355.

Source: 56 FR 33996, July 24, 1991, unless otherwise noted.

14 C.F.R. s 157.2

14 CFR s 157.2

END OF DOCUMENT

14 CFR s 157.3
14 C.F.R. s 157.3

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TITLE 14 - AERONAUTICS AND SPACE
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Titles 1-35 current through November 30, 1995; 60 FR 61644 Titles 36-50 current through January 1, 1996; 60 FR 67518 Title 26 current through January 1, 1996; 60 FR 67518

s 157.3 Projects requiring notice.

Each person who intends to do any of the following shall notify the Administrator in the manner prescribed in s 157.5:

(a) Construct or otherwise establish a new airport or activate an airport.

(b) Construct, realign, alter, or activate any runway or other aircraft landing or takeoff area of an airport.

(c) Deactivate, discontinue using, or abandon an airport or any landing or takeoff area of an airport for a period of one year or more.

(d) Construct, realign, alter, activate, deactivate, abandon, or discontinue using a taxiway associated with a landing or takeoff area on a public-use airport.

(e) Change the status of an airport from private use to public use or from public use to another status.

(f) Change any traffic pattern or traffic pattern altitude or direction.

(g) Change status from IFR to VFR or VFR to IFR.

<< PART 157 - NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS >>

Authority: Secs. 309, 313(a), 314, 72 Stat. 751; 49 U.S.C. 1350, 1354(a), 1355.

Source: 56 FR 33996, July 24, 1991, unless otherwise noted.

14 C.F.R. s 157.3

14 CFR s 157.3

END OF DOCUMENT

14 CFR s 157.3
14 C.F.R. s 157.3

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PART 157 – NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS

Titles 1-35 current through November 30, 1995; 60 FR 61644 Titles 36-50 current through January 1, 1996; 60 FR 67518 Title 26 current through January 1, 1996; 60 FR 67518

s 157.5 Notice of intent.

(a) Notice shall be submitted on FAA Form 7480-1, copies of which may be obtained from an FAA Airport District/Field Office or Regional Office, to one of those offices and shall be submitted at least –

(1) in the cases prescribed in paragraphs (a) through (d) of s 157.3, 90 days in advance of the day that work is to begin; or

(2) in the cases prescribed in paragraphs (e) through (g) of s 157.3, 90 days in advance of the planned implementation date.

(b) Notwithstanding paragraph (a) of this section –

(1) in an emergency involving essential public service, public health, or public safety or when the delay arising from the 90-day advance notice requirement would result in an unreasonable hardship, a proponent

may provide notice to the appropriate FAA Airport District/Field Office or Regional Office by telephone or other expeditious means as soon as practicable in lieu of submitting FAA Form 7480-1. However, the proponent shall provide full notice, through the submission of FAA Form 7480-1, when otherwise requested or required by the FAA.

(2) notice concerning the deactivation, discontinued use, or abandonment of an airport, an airport landing or takeoff area, or associated taxiway may be submitted by letter. Prior notice is not required; except that a 30-day prior notice is required when an established instrument approach procedure is involved or when the affected property is subject to any agreement with the United States requiring that it be maintained and operated as a public-use airport.

<< PART 157 – NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS >>

Authority: Secs. 309, 313(a), 314, 72 Stat. 751; 49 U.S.C. 1350, 1354(a), 1355.

Source: 56 FR 33996, July 24, 1991, unless otherwise noted.

14 C.F.R. s 157.5

14 CFR s 157.5

END OF DOCUMENT

14 CFR s 157.7
14 C.F.R. s 157.7

CODE OF FEDERAL REGULATIONS
TITLE 14 - AERONAUTICS AND SPACE
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Titles 1-35 current through November 30, 1995; 60 FR 61644 Titles 36-50 current through January 1, 1996; 60 FR 67518 Title 26 current through January 1, 1996; 60 FR 67518

s 157.7 FAA determinations.

(a) The FAA will conduct an aeronautical study of an airport proposal and, after consultations with interested persons, as appropriate, issue a determination to the proponent and advise those concerned of the FAA determination. The FAA will consider matters such as the effects the proposed action would have on existing or contemplated traffic patterns of neighboring airports; the effects the proposed action would have on the existing airspace structure and projected programs of the FAA; and the effects that existing or proposed manmade objects (on file with the FAA) and natural objects within the affected area would have on the airport proposal. While determinations consider the effects of the proposed action on the safe and efficient use of airspace by aircraft and the safety of persons and property on the ground, the

determinations are only advisory. Except for an objectionable determination, each determination will contain a determination-void date to facilitate efficient planning of the use of the navigable airspace. A determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts.

(b) An airport determination issued under this part will be one of the following:

(1) No objection.

(2) Conditional. A conditional determination will identify the objectionable aspects of a project or action and specify the conditions which must be met and sustained to preclude an objectionable determination.

(3) Objectionable. An objectionable determination will specify the FAA's reasons for issuing such a determination.

(c) Determination void date. All work or action for which notice is required by this sub-part must be completed by the determination void date. Unless otherwise extended, revised, or terminated, an FAA determination becomes invalid on the day specified as the determination void date. Interested persons may, at least 15 days in advance of the determination void date, petition the FAA official who issued the determination to:

(1) Revise the determination based on new facts that change the basis on which it was made; or

(2) Extend the determination void date. Determinations will be furnished to the proponent, aviation officials of the state concerned, and, when appropriate, local political bodies and other interested persons.

<< PART 157 – NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS >>

Authority: Secs. 309, 313(a), 314, 72 Stat. 751; 49 U.S.C. 1350, 1354(a), 1355.

Source: 56 FR 33996, July 24, 1991, unless otherwise noted.

14 C.F.R. s 157.7

14 CFR s 157.7

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14 CFR s 157.9
14 C.F.R. s 157.9

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Titles 1-35 current through November 30, 1995; 60 FR 61644 Titles 36-50 current through January 1, 1996; 60 FR 67518 Title 26 current through January 1, 1996; 60 FR 67518

s 157.9 Notice of completion.

Within 15 days after completion of any airport project covered by this part, the proponent of such project shall notify the FAA Airport District Office or Regional Office by submission of FAA Form 5010-5 or by letter. A copy of FAA Form 5010-5 will be provided with the FAA determination.

<< PART 157 - NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS >>

Authority: Secs. 309, 313(a), 314, 72 Stat. 751; 49 U.S.C. 1350, 1354(a), 1355.

Source: 56 FR 33996, July 24, 1991, unless otherwise noted.

14 C.F.R. s 157.9

14 CFR s 157.9

END OF DOCUMENT

APPENDIX 11

14 CFR s 91.1
14 C.F.R. s 91.1

CODE OF FEDERAL REGULATIONS
TITLE 14 – AERONAUTICS AND SPACE
CHAPTER I – FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER F – AIR TRAFFIC AND GENERAL OPERATING RULES
PART 91 – GENERAL OPERATING AND FLIGHT RULES
SUBPART A – GENERAL

s 91.1 Applicability.

(a) Except as provided in paragraph (b) of this section and s 91.703, this part prescribes rules governing the operation of aircraft (other than moored balloons, kites, unmanned rockets, and unmanned free balloons, which are governed by part 101 of this chapter, and ultralight vehicles operated in accordance with part 103 of this chapter) within the United States, including the waters within 3 nautical miles of the U.S. coast.

(b) Each person operating an aircraft in the airspace overlying the waters between 3 and 12 nautical miles from the coast of the United States shall comply with ss 91.1 through 91.21; ss 91.101 through 91.143; ss 91.151 through 91.159; ss 91.167 through 91.193; s 91.203; s 91.205; ss 91.209 through 91.217; s 91.221; ss 91.303 through 91.319; s 91.323; s 91.605; s 91.609; ss 91.703 through 91.715; and 91.903.

PART 91 – GENERAL OPERATING AND FLIGHT RULES

Authority: 49 U.S.C. app. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514, 35 FR 4247, 3 CFR, 1966-1970 Comp., p. 902; 49 U.S.C. 106(g).

Source: 56 FR 23178, May 20, 1991; 56 FR 48657, Sept. 25, 1991; 56 FR 65657, Dec. 17, 1991, unless otherwise noted.

SUBPART A – GENERAL

Source: 54 FR 34292, Aug. 18, 1989, unless otherwise noted.

14 C.F.R. s 91.1

14 CFR s 91.1

END OF DOCUMENT

14 CFR s 91.119
14 C.F.R. s 91.119

CODE OF FEDERAL REGULATIONS
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SUBCHAPTER F – AIR TRAFFIC AND GENERAL OPERATING RULES
PART 91 – GENERAL OPERATING AND FLIGHT RULES
SUBPART B – GENERAL

s 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of

this section if the operators is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

PART 91 – GENERAL OPERATING AND FLIGHT RULES

Authority: 49 U.S.C. app. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514, 35 FR 4247, 3 CFR, 1966-1970 Comp., p. 902; 49 U.S.C. 106(g).

Source: 56 FR 23178, May 20, 1991; 56 FR 48657, Sept. 25, 1991; 56 FR 65657, Dec. 17, 1991, unless otherwise noted.

SUBPART B – FLIGHT RULES

Source: 54 FR 34294, Aug. 18, 1989, unless otherwise noted.

14 C.F.R. s 91.119

14 CFR s 91.119

END OF DOCUMENT

No. 95-2054

Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

In The Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS;
DONALD ALTHOFF, Mayor of the City of Lake Angelus;
MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BEIER HOWLETT, P.C.
James L. Howlett
Counsel of Record
John D. Staran
200 East Long Lake Road,
Suite 110
Bloomfield Hills, MI
48304-2361
(810) 645-9400

Reardon-Parshall Co. 550 W. Fort St. Detroit MI 48226 (313) 962-0744

67pp

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in ruling that the Federal Aviation Act does not preempt the provisions of City of Lake Angelus ordinances 25(J) and 66(E) which prohibit seaplanes from landing or operating on the surface of Lake Angelus.

II.

Whether the Court of Appeals erred in ruling that City of Lake Angelus ordinances 25(J) and 66(E) satisfied the applicable legal test for validity by having a rational relationship to legitimate police power and land use concerns.

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I.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Gustafson is seeking a declaratory judgment invalidating provisions of the nuisance and zoning ordinances of the Respondent City of Lake Angelus which prohibit seaplanes from using the surface of Lake Angelus.

The City of Lake Angelus is Michigan's smallest city by population (328 per 1990 census). It is entirely a residential community, consisting of approximately 140 homes fronting on Lake Angelus, a small inland lake having no public access and lying entirely within the City. The principal function of the city government is to preserve the unique residential character, natural beauty, tranquillity and environmental quality of the community. Seaplanes have been prohibited by ordinance for many years and this prohibition has been strongly supported, respected and observed by the community and is viewed as a matter of substantial importance in preserving the essential character and quality of the City. No one has ever been arrested or prosecuted for violating the seaplane ordinances.

Petitioner Gustafson resides in a home on Lake Angelus, and desires to acquire a seaplane which could be moored in front of his home and flown to and from the lake for recreational purposes. He does not presently own a seaplane. Compliance with the ordinances would not restrict him from any established activity; it merely prevents him from undertaking a new recreational activity which is not permitted under the local ordinances.

Ordinance 25 is an amendment to the City's nuisance ordinance, and section 3 J thereof declares the following to be a public nuisance (Pet. App. 38a):

> The landing upon the lands, waters, or ice surface within the City of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft.

Ordinance 66 is an amendment to the City's zoning ordinance, which includes prohibitions against various land uses. Subsection 4.10 J thereof prohibits the following (Pet. App. 38a):

> The mooring, docking, launching, storage or use of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft.

When the suit was filed, both ordinances also prohibited "the flying of any such craft in the airspace above the City of Lake Angelus at an altitude of less than five hundred feet." That provision was subsequently deleted from both ordinances by amendment and is not at issue. The City never attempted to enforce the altitude limitation against Petitioner or anyone else and there is no actual controversy regarding it.

The factual basis of Petitioner's case arose from a single incident occurring on August 9, 1991, when Petitioner landed a rented seaplane on Lake Angelus in violation of the ordinances. He was not arrested or prosecuted, but a police officer contacted him at home later in the day and informed him that the landing violated city ordinances. Petitioner promptly requested that the City Council change the ordinances to permit seaplane landings. On September 10, 1991, the Lake Angelus City Council gave consideration to Petitioner's request, but denied the request and reaffirmed by resolution that the intended purpose of the ordinance was to protect the public health, safety and general welfare of persons and property within the City, and defined the public interests served as follows (Resp. App. 1a):

> . . . the City Council believes that the use of Lake Angelus in violation of the foregoing ordinance would be contrary to the public health, safety and welfare because of noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water, destruction of property values, interference with other lawful uses of the lake enjoyed by the great majority of citizens including boating, sailing, fishing, swimming, and other recreational uses; and

> . . . the unique nature of the community and the value attributed to property located in the City of Lake Angelus are based and depend upon the continuation of long-standing restrictions against uses deemed offensive by the great majority of citizens.

Having failed to persuade the City Council to rescind or modify the ordinances which prohibit seaplane landings, Petitioner filed this suit in the United States District Court for the Eastern District of Michigan on July 13, 1992, seeking to invalidate the ordinances. He also claimed that the ordinances violated his civil rights and sought relief under 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

B. Proceedings in District Court

The issues were framed under Petitioner's First Amended Complaint dated January 12, 1993, and Respondents' Answer to First Amended Complaint. There were no significant factual disputes, and both parties recognized that the case could be resolved as a matter of law without the necessity of an evidentiary trial. Cross motions for summary judgment were filed. At the motion hearing on October 21, 1993 both parties acknowledged on the record that there were no material issues of fact and that the case could be decided on the legal issues (Pet. App. 39).

On October 22, 1993, the day after oral argument, the District Court issued its written decision. The Court ruled that the ordinances were valid under applicable state law standards, but that the regulation of seaplane landing sites was preempted by the Federal Aviation Act. An injunction against enforcing the ordinances was issued. Petitioner's civil rights claims under 42 USC § 1983 and 42 USC § 1988 were dismissed on the merits.

C. Proceedings in the Court of Appeals

The Lake Angelus Respondents appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner Gustafson filed a cross appeal regarding his civil rights claims.

The Court of Appeals reversed the District Court ruling on federal preemption, found that there was no preemption, and

ruled that the ordinances are valid and enforceable. Consistent with that ruling, the Court of Appeals affirmed the dismissal of the civil rights claims.

The Court of Appeals decision is noteworthy for the content of the three separate opinions which were written. Judge Leroy J. Contie wrote the principal opinion, setting forth a detailed analysis applying the facts of the case to the established law. Judge Nathaniel R. Jones wrote a concurring opinion, indicating that Judge Contie's opinion was "legally unassailable" but expressing his general support of a strong central government. Judge Alice M. Batchelder wrote a concurring opinion, primarily directed toward Judge Jones' comments, citing *The Federalist* No. 45, and expressing her concern over the usurpation of the rights of states by the federal government. It appears that the Court of Appeals decision is supported by scholarly legal analysis and by a spectrum of policy viewpoints.

Petitioner sought a rehearing by the Court of Appeals en banc, but no judge of the Sixth Circuit requested a vote on the suggestion for rehearing en banc. The petition for rehearing was referred to the original hearing panel which denied it.

II.

PETITIONER'S MISSTATEMENTS OF FACT AND LAW

A. Petitioner's Question II is Defective

Petitioner's statement of Question II is inaccurate, misleading and argumentative:

> Whether a discriminatory city ordinance violates a riparian property owner/airman's rights to due process and equal protection where the ordinance is exclusionary, prohibits a reasonable use of the water, is arbitrary, capricious and not reasonably related to a government interest? (Petition, p i)

As stated, the question suggests that the legal nature of the ordinance is accurately described, and that the issue is whether such an ordinance would violate due process and equal protection

rights. Actually, both the District Court and the Court of Appeals have ruled that the ordinances were not as described. It was decided by both lower courts that the ordinances were not discriminatory, were not exclusionary, were not arbitrary and capricious, and were reasonably related to a legitimate governmental interest. The Petition does not raise a question for certiorari regarding the lower court's legal characterization of the ordinances, but has improperly premised the question which it does raise on a contrary and inaccurate characterization of the ordinances. This misstatement violates Supreme Court Rule 14. 1. (a), which requires that questions not be argumentative. Under Supreme Court Rule 14. 4, the failure of Petitioner to present this question with accuracy and clarity is sufficient reason for the Court to deny certiorari regarding it.

B. Petitioner Misrepresented an Altitude Issue

Petitioner repeatedly misrepresented to the Court that there is an issue in this case over the former provision of the City ordinances which prohibited flights at altitudes below 500 feet (Petition, pp 1, 3, 5, 7, 8 and 23). There is no such issue.

Petitioner states, "...the city vehemently denied that even the airspace portion of its local ordinance was preempted, until the District Court ruled that the 500 foot prohibition is Federally Preempted (Petition, p 7)." This statement is false and misleading. The District Court opinion correctly states the City's position as follows:

> Defendants ask the court to bifurcate the ordinances, separately considering the altitude restriction and the restriction on seaplane operations on the surface of the lake... Defendants seem willing to give up the altitude restriction, but not the landing portion. (Pet. App. 47)

Judge Contie's footnote on this subject, in the Court of Appeals decision, is precisely accurate:

> When the suit was filed, ordinance 66 included an altitude regulation which prohibited flying over the City at altitudes less than 500 feet. Although the altitude regulation had never been enforced against

> plaintiff or anyone else, plaintiff Gustafson also challenged its validity. The City acknowledged that this provision was federally preempted and did not argue in support of its validity. **The altitude regulation** was subsequently deleted from ordinance 66 by amendment and **is not at issue in this appeal**. (Pet. App. 3, emphasis provided.)

Petitioner's reason for raising this nonissue, and misrepresenting the City's position regarding it, appears to be to obscure the distinction between land use regulations which are not preempted and airspace regulations which are preempted. This strategy does not justify the Petitioner's misrepresentation. Instead, it subjects the petition to denial under United States Supreme Court Rule 14.4.

C. Petitioner Improperly Filed an *Amicus* Brief

Both parties were supported in the Court of Appeals by *amici curiae*. Petitioner was supported by a brief filed by *Amicus Curiae* Seaplane Pilots Association. Respondents were supported by a brief filed by *Amici Curiae* National Institute of Municipal Law Officers and Michigan Municipal League. Petitioner has included his *amicus* brief as part of his appendix (Pet. App. 54 to 76).

The filing of an *amicus* brief is governed by Supreme Court Rule 37. The Seaplane Pilots Association has not undertaken to file a brief in compliance with that rule.

Supreme Court Rule 14.2 provides, "No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file a petition for a writ of certiorari to which any supporting brief is annexed or appended." The *amicus* brief is a separate brief filed by the Petitioner to support his position.

Although Supreme Court Rule 14.1 (i)(vi) liberally permits a petitioner to append "any other material the petitioner believes essential to understand the petition," that provision should not be interpreted to avoid the provisions of Supreme Court Rules 37 and 14.2 or to permit the filing of argumentative material in excess of the 30 page limitation under Supreme Court Rule 33. Respondents urge the Court to disregard the *amicus* brief filed by Petitioner.

Respondents have not appended the supporting brief of *amici curiae* National Institute of Municipal Law Officers and Michigan Municipal League to this Brief in Opposition. If the Court should determine that the filing of such a brief as part of an appendix is proper and that it will be reviewed by the Court, Respondents request the opportunity to file a copy of the *amici* brief in support of their position as a supplemental appendix.

III.

PETITIONER HAS NOT ADDRESSED OR SATISFIED THE STANDARDS OF RULE 10

Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for "compelling reasons." Rule 10 explains the character of reasons considered by the Court and states that a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Petition does not cite or address the Rule 10 standards, and its content fails to disclose the requisite compelling reasons to grant the Petition. Furthermore, the asserted errors consist solely of alleged misapplications of established rules of law.

The Petition does not involve conflicts among decisions or an important new federal question. Instead, it involves two well established rules of law: (1) the tests for validity of local ordinances; and (2) the doctrine of federal preemption. Petitioner is asking the Court to review the alleged misapplication of the facts of this case to these established rules of law. Under the standards of Rule 10, this is not a proper case for United States Supreme Court adjudication.

With regard to the validity issue, Petitioner's argument is that the ordinances were discriminatory, arbitrary, capricious, based on inadequate knowledge, and not reasonably related to a governmental interest. All of these arguments were fully considered, and rejected by the District Court and by the Court of Appeals. The validity issue does not warrant Supreme Court review.

With regard to the federal preemption issue, Petitioner's argument is that preemption of the regulation of navigable airspace under established law should be applied to preempt the Respondent's land use ordinances. There is an established body of law in this area, discussed by both the District Court and the Court of Appeals. Petitioner does not seek to change or clarify the principles of federal preemption, but merely to assert that they were misapplied by the Court of Appeals. In view of three concurring opinions from the Court of Appeals and the failure of any Sixth Circuit judge to request a vote on further en banc consideration, the preemption issue does not warrant Supreme Court review.

Petitioner has failed to show a compelling reason for this Court to grant the Petition under the standards set forth in Rule 10.

IV.

ARGUMENT

A. Summary of Argument

1. Ordinance Validity Issue. Under Michigan law, local regulation of lake uses is recognized as being valid under the police power and zoning authority the same as the regulation of land uses. Since Lake Angelus could prohibit airplane and helicopter landings on the land under established law, it can also prohibit seaplane landings on the lake under its police power and zoning authority. The test for validity is the existence of a rational relationship to the public health, safety and welfare, and there is a presumption of validity. The District Court and the Court of Appeals correctly determined that the ordinances in question were valid.

2. Federal Preemption Issue. Federal preemption is based upon congressional intent. The language of the Federal Aviation Act, its legislative history, and judicial precedent indicate a congressional intent to preempt the regulation of navigable airspace, and not to preempt the regulation of the surface of the earth. Courts have consistently ruled that the Federal Aviation

Act does not preempt local land use regulations, including the prohibition of aircraft and seaplane landings. The Court of Appeals correctly determined that the ordinances in question were not federally preempted.

B. Michigan Law Permits Municipalities to Regulate the Use of Lakes Within their Boundaries

In two recent Michigan cases, the Michigan Supreme Court has made it clear that the use of lakes is subject to municipal regulation under the police power and zoning power.

Square Lake Hills Condominium Association v Bloomfield Township, 437 Mich 310; 471 N.W.2d 321 (1991), ruled that townships may regulate boat usage on their inland lakes under their police power. A dissenting opinion indicated that such regulation is permitted as a land use limitation, but must be adopted under zoning ordinance procedures. Lake Angelus prohibits seaplanes under both its police power nuisance ordinance and its zoning ordinance.

In *Square Lake*, the Michigan Supreme Court affirmed the "rational relationship" test for determining the reasonableness of a police power ordinance:

> The reasonableness of an ordinance, while a question of law, depends upon the particular facts of each case.... The test for determining whether an ordinance is reasonable requires us to assess the existence of a rational relationship between the exercise of the police power and the public health, safety, morals, or general welfare in a particular manner in a particular case. *Square Lake*, p 318.

Applying that test to the facts before it, the court ruled as follows:

> ...Bloomfield Township determined that it was necessary to regulate boat usage in order to preserve and protect the health, safety and welfare of persons using and living near the inland lakes. The township found that lack of regulation resulted in a nuisance

> condition, and impairment of important and irreplaceable natural resources, the destruction of property values, and a threatening of the public health, safety, and welfare. Furthermore, the township recognized that if proper safety precautions were not immediately taken, the use of boats on inland lakes could be very dangerous to the persons and riparian property owners using the lake. In our view, Bloomfield Township took reasonable steps to alleviate future problems by recognizing this potential hazard. *Square Lake*, p 326.

The Michigan Supreme Court also cited the Michigan Constitution as authority in support of its decision upholding the ordinance:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.... Michigan Const 1963, Art 7, § 34. *Square Lake*, p 319, footnote 15.

The Resolution of the Lake Angelus City Council adopted September 10, 1991, (Resp. App. 1a), states the public purposes served by the seaplane prohibition, and satisfies the "reasonable relationship" test.

Hess v West Bloomfield Township, 439 Mich 550, 486 N.W.2d 628 (1992), addresses the subject of boat regulation based on the zoning power. In this case, the Michigan Supreme Court ruled that riparian rights to use adjacent waters are subject to regulation under the zoning power. In upholding the West Bloomfield ordinance which regulated docks and the launching and mooring of boats, the court stated:

> In order for townships to properly protect the bodies of water from destruction or impairment, pursuant to their zoning power ..., there must be an ability to regulate the exercise of riparian rights. To prohibit townships from exercising such regulatory zoning authority over riparian rights would permit the destruction or impairment of the natural resources associated with such bodies of water....

> This clearly could not have been the intention of the Legislature when it expanded the powers of townships to regulate land development and to promote the public health, safety, and welfare, pursuant to the zoning authority.... *Hess*, p 565

C. The Lake Angelus Ordinances Satisfy the Rational Relationship Test and Were Correctly Ruled to be Valid under Michigan Law

Ordinance 25 is a nuisance ordinance duly adopted pursuant to the police power granted to the City of Lake Angelus under its City Charter issued pursuant to Michigan's Home Rule Cities Act, M.C.L.A. 117.1, *et seq*; M.S.A. 5.2071, *et seq* (Resp. App. 28a). Ordinance 66 is a zoning ordinance duly adopted pursuant to the zoning power granted to the City of Lake Angelus under its City Charter and under Michigan's City and Village Zoning Act, M.C.L.A. 125.581, *et seq*.; M.S.A. 5.2931, *et seq* (Resp. App. 31a). As such, the ordinances are presumed to be reasonable and valid. *Kropf v Sterling Heights*, 391 Mich 139; 215 N.W.2d 179 (1974).

The provision quoted above from *Square Lake* indicates that the "rational relationship" test determines the validity of municipal ordinances which regulate the use of lakes. Ordinances 25 and 66 bear a rational, reasonable and substantial relationship to the protection and enhancement of the public health, safety and welfare and were enacted by the City of Lake Angelus after giving full and appropriate consideration to the rights of individuals and the public interest. The legislative purpose is clearly set forth in the Resolution of the Lake Angelus City Council adopted on September 10, 1991 (Resp. App. 1a). Aside from noise regulation, which may be preempted, the stated public purposes are all rational and reasonable. Actual and apprehended danger from aircraft landing and taking off from a small private lake used by boats and swimmers is certainly reasonable. The pollution, contamination and infestation of the lake are certainly reasonable concerns. In his deposition testimony (Resp. App. 5a) the Plaintiff acknowledged that he only recently became aware of zebra mussel infestation concerns, and has modified his own conduct as a result. Other pilots may still be unaware of the problem or

unwilling to take action required to avoid zebra mussel infestation by flying from contaminated lakes. The destruction of property values dependent in part upon the privacy and tranquillity of Lake Angelus are threatened, as are the uses of the lake by the great majority of citizens for boating, sailing, fishing, swimming and other recreational uses.

In his comments at the motion hearing in District Court, and in his written opinion, Judge Gadola correctly applied the rational relationship test to the facts of this case, as follows:

> The Court: For instance, regardless of the fact that you may feel that boats are a lot more dangerous than airplanes, and that may very well be, it seems to me that, absent the preemption doctrine, the — council . . . could adopt a regulation regarding airplanes on the basis that in the event of a malfunction, a boat isn't going to plunge into a neighborhood, you know, and — cause havoc and burn down houses and all that sort of thing, but a plane certainly can. (Transcript, p. 16; Resp. App. 8a.)

> The Court: Isn't there a legitimate state interest in . . . abating noise? Isn't there legitimate state interest in avoiding . . . the possibility of . . . a landing or taking off aircraft diving into an inhabited subdivision? (Transcript, pp. 28-29; Resp. App. 8a)

> The Court: . . . you demonstrate by your remarks the fact that . . . (safety concerns are) . . . a disputable point. That's a matter that seems to me is discretionary within the legitimate discretion of the municipality. (Transcript, p. 30; Resp. App. 7a).

> In addition, defendants have presented multiple rationales supporting the ordinances. The court finds that each of them is rationally related to a legitimate state interest. (Opinion, Pet. App. 49)

The Lake Angelus ordinances are within the delegated legislative authority of a Michigan municipality, satisfy the controlling rational

relationship test, are valid under applicable state law, and are enforceable unless their enforcement is federally preempted.

D. Federal Preemption Under Article VI of the Constitution is Based on Legislative Intent

The doctrine of federal preemption arises under the Constitution of the United States, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Wisconsin Public Intervenor v Mortier, 501 U.S. 597; 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) sets forth a lucid statement of the law of federal preemption:

> Under the Supremacy Clause ... state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." (Case cited.) The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent. (Case cited.) Congress' intent to supplant state authority in a particular field may be expressed in terms of the statute. (Case cited.) Absent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress ... touch(es) a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude statute authority. (Cases cited.) When considering preemption, "we start

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Case cited.)

Even when Congress has not chosen to occupy a particular field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," (case cited), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (case cited).

It is, finally, axiomatic that "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."

There is a three-way test under which federal preemption may occur: (1) Congress may expressly preempt a legislative subject matter; (2) Congress may impliedly preempt a legislative subject matter by occupying the subject so pervasively that there is no room for state and local legislation on the subject; or (3) preemption is implied if there is a direct conflict between federal and state legislation so that compliance with both is not possible.

Regardless of which of the three preemption tests is being applied, the goal is to identify the intent of Congress, and to determine whether or not Congress has expressly or impliedly undertaken to pass a federal law which preempts the legislative subject.

In this case, it is necessary to determine whether the Federal Aviation Act was intended to preempt the right of local government to prohibit seaplanes from landing in lakes within their boundaries

E. The Federal Aviation Act Was Not Intended to Preempt Local Land Use Regulations

Section 1508 of the original Federal Aviation Act set forth an express statement by Congress of the intended scope of its regulation:

> The United States of America is declared to possess and exercise complete and exclusive sovereignty in the **airspace** of the United States. (49 U.S.C. § 1508 (former), emphasis provided.)
>
> The 1994 amendment of the Act restated this declaration as follows:
>
> The United States Government has exclusive sovereignty of **airspace** of the United States. (49 U.S.C § 40103(a)(1) emphasis provided.)

Section 40103(b)(1) of the Act [former section 1348(a)] delegates to the Federal Aviation Administration the following implementation authority:

> (a) The Administrator of the Federal Aviation Authority shall develop plans and policy for the use of the **navigable airspace** and assign by regulation or order the use of the **airspace** necessary to ensure the safety of aircraft and the efficient use of **airspace**.... (49 U.S.C. § 40103(b)(1), emphasis provided.)

The statute asserts regulatory authority over the *airspace*, which is distinguishable from the *surface of the earth*. "Airspace" is not defined in the statute. The term "navigable airspace" is defined in the Act as follows:

> "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations... including airspace needed to ensure safety in the takeoff and landing of aircraft. (49 U.S.C. § 40102(a)(30))

Section 40103(b)(2) of the Act [former section 1348(b)] delegates to the Federal Aviation Administration the following implementation authority relating to the *regulation of flight, not landing rights:*

> The Administrator shall prescribe air traffic regulations on the **flight of aircraft** (including regulations on safe altitudes) for —
>
> (A) navigating, protecting, and identifying aircraft;
>
> (B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects. (49 U.S.C. § 40103(b)(2), emphasis provided.)

Petitioner argues that for purposes of this case, the preempted "airspace" includes the surface of Lake Angelus (Petition, p 22). This position is contrary to both common sense and established law on the meaning and interpretation of statutory language. "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." *Caminetti v United States,* 242 U.S. 470, 484, 61 L.Ed. 442, 452, 37 S.Ct. 192, 194 (1917). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v Dollar Park and Fly, Inc.,* 469 U.S. 189, 194, 105 S.Ct. 658, 661, 83 L.Ed.2d 582 (1985). "The term 'interest' is not specifically defined in the RICO statute. This silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' (citing case)" *Russello v United States,* 464 U.S. 16, 104 S.Ct. 296, 298, 78 L.Ed.2d 17 (1983). The preemptive regulation of airspace under the statute cannot reasonably be interpreted to include the regulation of the earth's surface, based on the language of the statute.

City of Burbank v Lockheed Air Terminal, 411 U.S. 624, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973) is the landmark decision on preemption under the Federal Aviation Act. In that case, the Supreme Court, by a five to four decision, ruled that the City of Burbank could not use municipal curfews to impose noise regulations on aircraft operations. Although the case ruled that the ordinance in question was preempted for special reasons, more importantly it recognized that many subjects relating to aircraft are not preempted.

For example, footnote 14 of the *Burbank* decision established the "proprietary exclusion" from preemption, which is the basis

for a line of cases ruling that municipalities could impose regulations, including noise regulations, if they were the proprietor of a municipal airport, which they might be preempted from imposing on nonproprietary facilities. *Alaska Airlines v City of Long Beach*, 951 F.2d 977 (9th Cir, 1991); *Greater Westchester Homeowners Association v City of Los Angelus*, 603 P.2d 1329 (1979), cert. denied 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980); *Santa Monica Airport Association v City of Santa Monica*, 659 F.2d 100 (9th Cir, 1981); *Global International Airways Corp v Port Authority of New York and New Jersey*, 727 F.2d 246 (2nd Cir, 1984). The extensive applicability to airports throughout the country of the proprietary exclusion from federal preemption, although not applicable to this case, makes it clear that the Federal Aviation Act does not preempt land use regulations applicable to aircraft.

The dissenting opinion in *Burbank*, written by Justice (now Chief Justice) Rehnquist, joined by Justices Stewart, White and Marshall, explored the legislative history and found extensive material indicating that *Congress did not intend to preempt local authority to regulate land use*, including the following:

> In dealing with this (noise) issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.
>
> Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill. (Senate Commerce Committee report quoted in Rehnquist dissent in *Burbank*)

Burbank is often cited as authority in a line of cases which recognize the right of local government to restrict, and prohibit, aircraft landings through land use and zoning regulations. *Faux-Burnhams v County Commissioners of Frederick County*, 674 F.Supp. 1172 (D.Md. 1987)("No federal law gives a citizen

the right to operate an airport free of local zoning control."); *Wright v County of Winnebago*, 391 N.E.2d 772 (1979)(FAA does not preempt local zoning); *Garden State Farms v Bay*, 77 N.J. 439; 390 A.2d 1177 (N.J., 1978)(heliport prohibited); *Wood v City of Huntsville*, 384 So.2d 1081, (Ala., 1980)(helipad prohibited); *Dallas/Fort Worth International Airport Board v City of Irving*, 854 S.W.2d 161 (Tex., 1993)(local zoning against airport construction and expansion not preempted-citing *Burbank* dissent; decision vacated following change in statute); *Ford City Bank and Trust Company v County of Kane*, 114 Ill. App. 3d 940; 449 N.E.2d 577 (Ill., 1983)(local regulation limiting number of aircraft permitted in restricted landing area valid); *Appeal of Green and White Copter, Inc.*, 25 Pa. Cmwlth. 445; 360 A.2d 283 (Pa., 1976)(prohibition of heliports under zoning ordinance valid); *Bluebell Associates v Township Engineer for Whitpain Township*, 45 Pa. Cmwlth. 599; 405 A.2d 1070 (Pa., 1979)(prohibition of airports under zoning ordinance valid).

In *Condor Corporation v City of St. Paul*, 912 F.2d 215, 219 (8th Cir, 1990), the Circuit Court of Appeals upheld municipal regulation of a heliport, rejecting a preemption argument and making the important distinction between airspace and land use regulation, as follows:

> "We see no conflict between a city's regulatory power over land use, and the federal regulation of airspace, and have found no case recognizing such a conflict. (citing *Wright* and *Garden State Farms.*)"

F. FAA Regulations Do Not Preempt Local Seaplane Prohibitions

The Regulations promulgated by the FAA do not expressly or by implication preempt the regulation of seaplane landing sites. The only reference to the use of lakes by seaplanes in the Federal Air Regulations is an operational regulation at 14 C.F.R. § 91.115:

> Right of way rules: Water operations. (a) General. Each person **operating** an aircraft on the water shall, insofar as possible, keep clear of all vessels and avoid impeding their navigation, and shall give way to any vessel or

> other aircraft that is given the right-of-way by any rule of this section." (14 C.F.R. 91.115, Pet. App. 14, emphasis supplied)

There is also an altitude regulation, applicable to all aircraft, which establishes different minimum altitudes for flights over land and over water (14 C.F.R. § 91.119(c), Pet. App. 104). There are no other Regulations even remotely applicable to seaplane landing rights. The FAA has not undertaken the comprehensive or even limited regulation of seaplane landing sites.

With regard to airport sites, which are defined in 14 C.F.R § 157.2 (Pet. App. 92) to include seaplane bases, the FAA has expressly deferred to state and local government. Although it issues advisory "determinations" on proposed airport sites, the Regulations provide:

> A determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts. (14 C.F.R. § 157.7(a), Pet. App. 99)

There is no statute or regulation which would satisfy the three way test for federal preemption of a local prohibition against seaplane landings. First, there is no express statement of preemption indicating that Congress or the FAA intended to authorize seaplane landings on all bodies of water and to preempt local regulation of the water surface. Second, there could be no implication of preemption based on total federal occupancy of the regulation of seaplane landing rights, since there are no regulations which even mention the right to land seaplanes. Third, there could be no implication of preemption arising from inherent conflict, since the regulations only relate to the safe operation of seaplanes, and not to their right to land at any particular location, and do not purport to grant landing rights.

The FAA itself has recognized that landings may be prohibited by local ordinance, since it has noted the Lake Angelus prohibition in its official publication. The United States Government Flight

Information Publication, *Airport/Facility Directory*, which purports to be "Published in accordance with specifications and agreements approved by the Federal Aviation Administration and the Department of Commerce" includes as part of the Airport Remarks relating to Oakland Pontiac Airport, the following (Resp. App. 13a).

> "Seaplane landings and takeoffs on Lake Angelus 4.5 miles ENE is prohibited by local ordinance."

Furthermore, it is beyond the scope of reason to consider that the very limited regulations relating to waters, and directed solely toward operational safety, and not to access rights, could be expanded in their legal effect to preempt an entire area of recognized state and local regulatory authority over the use of the surface of lands and waters.

G. Seaplanes are Regulated by State and Local Government Throughout the United States

The Petition suggests that the validation of the Lake Angelus ordinances would create a new and dangerous precedent under which state and local governments could interfere with the exclusive right of the Federal Aviation Authority to regulate seaplane landing sites. Actually, the converse is true. A decision in favor of the Petitioner would disrupt well established state and local seaplane regulations which exist throughout the country.

For example, the Wisconsin Statutes provide:

Local regulation of seaplanes (1) City, village and town ordinances. Any city, village or town adjoining or surrounding any waters may, after public hearing, by ordinance:. . .(b) Prescribe the areas which may be used as a landing and take-off strip for the aircraft or prohibit the use of the waters altogether. (Wis. Stat. @ 30.78, Resp. App. 15a)

The Vermont Statutes provide:

The landing of an aircraft on the lands or waters of another, without consent, or where there has been no airport, heliport,

restricted landing area or seaport established in accordance with the provisions of this title, is unlawful, except in the case of a forced landing. (5 V.S.A. @ 403, Resp. App. 17a)

The Pennsylvania Statutes provide:

The following represents rating categories to be used by the Bureau for issuance of an airport license:. . . (2) Private airport . . . (v) Seaplane. An area of water used as a landing area. (67 Pa. Code @ 471.5, Resp. App. 19a)

The Iowa Statutes provide:

It is unlawful for any aircraft to make use of the inland lakes of the state, except in the transportation of persons or property between points separated by a distance of thirty miles or more. (Iowa Code @ 462A.30, Resp. App. 22a)

The New Hampshire Aeronautics Act makes it unlawful:

For any person to operate or authorize the operation of aircraft for compensation or hire from any of the public inland waters or ice areas of the state unless such area is registered with the department. (New Hampshire RSA 422.1, Resp. App. 27a)

The Connecticut Statutes provide:

No person shall cause or permit an aircraft . . . to land upon, take off from or be operated, kept, parked, garaged, stored or otherwise maintained on any distribution or storage reservoir or on any watercourse tributary to any such reservoir. (CT ST s 25-43, Resp. App. 24a)

The foregoing are merely a sample of the pervasive and varying state and local regulations of seaplanes which exist throughout the United States. Although many other statutes could be cited, it is clear from the foregoing that the states, and not the federal government, are the actual regulators of seaplane landing sites.

H. Seaplane Prohibitions Have Been Held to be Valid by The Second Circuit, The Eleventh Circuit and State Courts in Texas, Louisiana, New York and Florida

Christianson v Hauptman, 991 F.2d 59 (2nd Cir., 1993), recognized the propriety of local decisions and the authority of land use agencies to prohibit seaplanes. Pursuant to the Fire

Island National Seashore Act, the National Park Service adopted rules in 1966 which prohibited seaplane landings. In 1979, at local request, the Park Service exempted Robbins Rest, a forty home residential community, from the regulation, thereby permitting seaplanes to land at Robbins Rest. In 1985, again at local request, the exemption for Robbins Rest was rescinded, thereby reestablishing the seaplane prohibition. A seaplane pilot brought suit against the National Park Service, asserting that its action was arbitrary and capricious. The Court of Appeals affirmed the District Court dismissal of the action, commenting, "Therefore, the decision to prevent seaplanes from landing and docking at Robbins Rest properly contributed to a reduction in noise and potential danger from the planes, thereby adding to the area's natural ambiance (p 63)."

Georgia Power Company v Baker, 830 F.2d 163 (11th Cir., 1987), upheld the right of a federally licensed power company to prohibit seaplanes from using its reservoir, even though its license issued by the Federal Energy Regulatory Commission required that it permit the use of the reservoir "for the purpose of full public utilization of such lands and water for navigation and for outdoor recreational purposes, including fishing and hunting." The Court noted that "Georgia Power's primary concern in prohibiting seaplanes was the safety of the public" and "(m)ore importantly, the company decided that seaplane operation on its reservoirs would present significant hazards both to the boating public and to seaplane pilots. Take-off and landing constitute a danger in themselves; and the exposed propeller of seaplanes poses an additional hazard to people on the lake as well as around docking facilities and boat ramps." Although the decision does not expressly discuss federal preemption, it states, "Accordingly, to the extent its rights are not inconsistent with federal law, Georgia Power has the authority to exclude adjacent landowners from the surface of the lake over its property." The Court ruled, "Georgia Power's prohibition of seaplanes on its reservoirs is a thoughtfully conceived policy and is a reasonable limitation on public access to its lake properties. As such, the ban is a proper application of Georgia Power's state law rights exercised in conformity with its federal license."

In two earlier state court cases, cited with approval by the Court of Appeals in this case, the courts upheld municipal ordinances which prohibited seaplane landings. In *City of Shreveport v Conrad*, 212 La. 737; 33 So.2d 503 (1947), the City of Shreveport prosecuted the defendant for low flying and landing a seaplane on Cross Lake in violation of a local ordinance. The defendant claimed that the ordinance was illegal, ultra vires and unconstitutional, and raised many of the arguments raised by Petitioner in this case: that aircraft did not pose a real or substantial threat to the purity of the water; that the ordinance was arbitrary and discriminatory because it did not also prohibit boats; and that the ordinance violated the equal protection and due process provisions of the constitution. The Louisiana Supreme Court rejected all of these arguments, ruled in favor of the City, and stated:

> The city has been granted sufficient police power to protect the health of its citizens from the pollution or contamination of its water supply and we are not prepared to say that the city abused its discretion in adopting the ordinance, or that it has no substantial relation to the pollution or contamination of the waters of the lake....
>
> The ordinance involved herein affects alike all persons similarly situated. In other words, it applies to all operators of planes. It is not arbitrary or discriminatory within the purview of the constitution. Due process of law and equal protection are had because the ordinance affects alike all persons similarly situated.

The present case is even stronger than the *Shreveport* case. Cross Lake is located outside of the municipal boundaries of Shreveport, but a state statute granted Shreveport limited authority to regulate the lake to prevent pollution and contamination and the court found the seaplane prohibition to be within that narrow regulatory power. Since Lake Angelus is located within the municipal boundaries, the City of Lake Angelus has a full spectrum of regulatory police powers and land use powers over the lake under Michigan law.

In *People v Altman*, 304 N.Y.S.2d 534; 61 Misc. 2d (1969), the defendant was prosecuted for landing a seaplane in Reynolds Channel, in the Town of Hempstead, in violation of a local ordinance. The defendant argued federal preemption under the Federal Aviation Act and unconstitutionality. The Court rejected the defendant's arguments and upheld the validity of the ordinance. In rejecting the preemption argument, the Court reviewed the law of federal preemption and stated:

> . . . local legislation will survive when its conflict with federal law is so indirect and not wholly repugnant to federal statute so that in the end the two are reconciled.

The *Altman* court also ruled that the ordinance was constitutional, noting:

> It is a familiar principle that there is a strong presumption of constitutionality attached to legislative enactments and those who seek to have them declared invalid must demonstrate their invalidity beyond a reasonable doubt. . . . Such presumption attaches as strongly to a municipal ordinance as to a state statute.

Helms v Diamond, 76 Misc. 2d 253; 349 N.Y.S.2d 917 (1973) involved the validity of a New York Environmental Conservation Department order which prohibited the landing of seaplanes on approximately 700 designated bodies of water. The plaintiff alleged that the order was invalid as to certain bodies of water which he had previously used in an air taxi business. The New York court upheld the seaplane prohibition, commenting, "However, it would seem, considering noise pollution alone, which should be as much the concern of the Legislature and its representatives as are other forms of pollution such as water and air pollution . . . , would justify regulations concerning the use of seaplanes . . . on State property."

In *Venetian Shores Home and Property Owners v Ruzakawski*, 336 So.2d 399 (1976), the Court of Appeals of Florida overruled an administrative order which authorized seaplane landings at a site which a hearing examiner had determined to be inadequate. The hearing examiner had determined that the proposed landing

site failed to satisfy the following standard under the Florida Administrative Code: "No seaplane base shall be approved which requires aircraft to operate in close proximity to a bridge, public beach, power line, boat dock or other area which could constitute a danger to persons or property." Despite the hearing examiner's finding the administrative agency granted a limited license authorizing the defendant to use his personally owned seaplane at the site. The Court held that the order was in violation of the applicable Florida statute and quashed it, thereby prohibiting all seaplanes at the site.

These six cases, all specifically relating to seaplane prohibitions and directly in point, provide authority for the rejection of all of Petitioner's arguments. *There are no reported cases in which seaplane prohibitions have been ruled to be unconstitutional or federally preempted.*

I. Public Policy Favors Local Regulation of Lake Uses

The right of state and local government to regulate the uses of land within their jurisdictions is a well recognized feature of American law. The federal government is not able to make reasonable determinations regarding local land use matters, and they are properly left to state and local government. Courts have consistently recognized that local government may regulate, restrict and prohibit the use of land for airports and heliports. There is no reasonable basis to distinguish between local authority to regulate the location of landing sites for land based aircraft and the authority to regulate the location of landing sites for seaplanes. Both involve the health, safety and welfare of the local community and both are matters of local regulatory concern.

In *Garden State Farms v Bay*, supra, at 1182, the Court commented on public policy as applying to possible preemption of heliport regulation, as follows:

> . . . as a policy matter, if federal preemption were found in the present case, state and local governments, which are the only bodies that currently license privately operated helistops and heliports, would be shorn of this regulatory responsibility. Congress could not have

> intended to create a governmental vacuum with respect to privately operated helistops. (citing cases) Accordingly, we conclude that federal legislation and regulation have not preempted state and local jurisdiction with respect to the placement of private helistops.

Similarly, only state and local government are in a position to regulate the use of inland lake surfaces by water craft of various types, and the federal government has not undertaken to do so. Zoning and land use matters are properly left to local government, and under *Square Lake*, supra, and *Hess*, supra, zoning and land use regulatory authority includes the right to regulate lake uses in Michigan.

J. The Fatal Defect in Petitioner's Argument is the Failure to Distinguish Between Airspace and Land Use Regulation

Petitioner argues, "The effect of this (Court of Appeals) opinion will be . . . to render seaplane travel in this country a **flight through a minefield** of local regulations (Petition, p 11, emphasis supplied)." This strange mixed metaphor illustrates the fundamental defect in Petitioner's argument.

Minefields are on the surface of the earth, not in the navigable airspace where flight occurs. The FAA is not authorized to eliminate minefields. The FAA is not able to evaluate local land use concerns and does not do so. Local government has the authority and responsibility to protect the public from land uses which endanger the public health, safety and welfare.

The Courts have ruled consistently that state and local government may regulate landing sites and may prohibit the landing of airplanes, seaplanes and helicopters. The Court of Appeals correctly determined that the Lake Angelus ordinances were valid and enforceable and not subject to federal preemption.

Petitioner's argument that the "seaplane industry" is threatened, has no merit. State and local seaplane prohibitions are widespread and long standing, with no apparent effect on the industry. The Lake Angelus ordinances have been in effect for more than twenty years.

V.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

BEIER HOWLETT, P.C.
James L. Howlett
Counsel of Record
John D. Staran
200 East Long Lake Road,
Suite 110
Bloomfield Hills, MI
48304-2361
(810) 645-9400

Dated: July 23, 1996

No. 95-2054

In The Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS;
DONALD ALTHOFF, Mayor of
the City of Lake Angelus;
MICHAEL STEFANI, Chief of Lake
Angelus Police Force,

Respondents.

APPENDIX

BEIER HOWLETT, P.C.
James L. Howlett
Counsel of Record
John D. Staran
200 East Long Lake Road,
Suite 110
Bloomfield Hills, MI
48304-2361
(810) 645-9400

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Appendix A

Resolution of the City Council
of the City of Lake Angelus, September 10, 1991

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LAKE ANGELUS

Whereas, the City Council of the City of Lake Angelus has given consideration to the intended purposes and reasonableness of Section 3 J City Ordinance No. 22, as amended, which declares the following to be a misdemeanor and a public nuisance:

> The landing upon the lands, waters, or ice surface with the City of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft or the flying of any such craft in the airspace above the City of Lake Angelus at an altitude of less than five hundred feet; and

Whereas, the City Council has determined and hereby reaffirms that the intended purpose of the foregoing ordinance is to protect the public health, safety, and general welfare of persons and property within the City of Lake Angelus; and

Whereas, the City Council believes that the use of Lake Angelus in violation of the foregoing ordinance would be contrary to the public health, safety, and welfare because of noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water, destruction of property values, interference with other lawful uses of the lake enjoyed by the great majority of citizens including boating, sailing, fishing, swimming, and other recreational uses; and

Whereas, the unique nature of the community and the value attributed to property located in the City of Lake Angelus are based and depended upon the continuation of longstanding restrictions against uses deemed offensive by the great majority of citizens;

It is therefore resolved that the City Council of the City of Lake Angelus reaffirms that Section 3 J of City Ordinance No. 22, as amended, is reasonable, appropriate, and in the best interest of the public health, safety, and general welfare of persons and property within the City of Lake Angelus.

Adopted by the City of Council of the City of Lake Angelus at its meeting held September 10, 1991.

/s/ FRANCIS C. MCMATH
Francis C. McMath, Mayor

/s/ NANCY DELORGE
Nancy DeLorge, Clerk

1220 H

Appendix B

Excerpt from Deposition of Robert Gustafson, May 21, 1993

Q Is there anything different or in addition to what you told us before that you would now incorporate as part of a seaplane checkout, as opposed to back in 1991?

A Well, subsequent to these original flights and discussions, I have come to know through papers and, of course, through Lake Angelus making reference to it, about the mussel parasite that could be on different surfaces of boats, airplanes, whatever else.

In view of the fact that the floats themselves are absolutely tight and screwed tight with no exhaust pipes or any other kind of openings in them, if a float is up off the water, it could be examined very carefully to see that there are no parasites on; or, in fact, if you wanted to get it off, you could wash them off before you actually leave.

I now know that. And particularly if I was landing at Lake Angelus, I would certainly make sure that that happens.

However, Lake Angelus doesn't have, on their boats, any kind of requirements for washing before their boats go in Lake Angelus. But,

certainly, I would see to it and have an opportunity to see it with the airplane.

MR. CHAIT: Thank you. I have nothing further.

— — —

OAKLAND COURT REPORTERS, INC.
1520 N. Woodward - Suite 50
Bloomfield Hills, Michigan 48013
(313) 645-5035

Appendix C

Excerpts from Transcript of hearing on Motions for Summary Judgment, October 21, 1993

[Transcript p 16] THE COURT: Well, I understand, but that's again — and it seems to me that's a judgement to be made by the village council; that is, the elected representatives.

For instance, regardless of the fact that you may feel that boats are a lot more dangerous than airplanes, and that may very well be, it seems to me that, absent the preemption doctrine, the — the council, the board, whatever the governing body of the municipality is concerned, could adopt a regulation regarding airplanes on the basis that in the event of a malfunction, a boat isn't going to plunge into a neighborhood, you know, and — and cause havoc and burn down houses and all that sort of thing, but a plane certainly can.

[Transcript p 28] MR. CHAIT: Yes, your Honor. That kind of goes, again, hand in hand. Both Mr. Stefani and Mr. Althoff who are the individuals who specifically are in charge with enforcing these and — and enacting these improper regulations or ordinances, are specifically denying Mr. Gustafson the opportunity to — to — to use his constitutionally granted rights to operate a vehicle out there when there's really no rational basis for preventing him from doing it. It really comes down to — and your Honor, if — I think I've touched on this before — but if the Court looks at the — the history of these ordinances, I think they clearly knew all along that they didn't have the ability to do this or the right to do this. It's only very recently that they've even gotten these arguments from the *Square Lake Hills* case and the *Hess* case.

THE COURT: Now leaving out the preemption issue for the moment, it's your contention then that these — that these ordinances are not rationally related to any legitimate state interest?

MR. CHAIT: I absolutely believe that, your Honor. There is absolutely —

THE COURT: Isn't there legitimate state interest in — in — in abating noise? Isn't there legitimate state interest in avoiding — even though the — the danger may be remote — but avoiding the — the possibility of an — of a — a landing or taking off aircraft diving into an inhabited [Transcript p 29] subdivision?

MR. CHAIT: Your Honor, number one, there is no greater risk in my opinion, of the — of what you've just indicated as far as an airplane crashing. Those aircraft are in — that community is within the airport traffic area of Oakland-Pontiac Airport.

THE COURT: That's not an airport.

MR. CHAIT: Well, that's correct. But they — those aircraft are going to be out there, and that's a high density airplane area and there's nothing that anyone — they knew that when they built the —

THE COURT: But I — I don't know a lot about — you know, I don't claim — profess to be an expert regarding aircraft, but don't you suppose that the municipality could rationally adopt the view the — that the greatest danger from aircraft is during the take-off and the landing? I have at least read that, and I don't profess to — to be any sort of an expert regarding aircraft. But I understanding that most accidents involving aircraft, occur during either take-off or landing.

MR. CHAIT: Your Honor, I would state number one, that we would have expert testimony to indicate that seaplane operation is very safe. I —

THE COURT: But isn't that a — isn't that a — isn't that a judgment call?

[Transcript p 30] MR. CHAIT: Well, I think they're going to be unable — they don't have any expert or any studies or anything — it's clear on their — on the — in the records of this case already — they've never made those kind of studies. And without having made those studies, it is an arbitrary — I mean frankly, Mr. Stefani said well, hey, everybody knows that airplanes are dangerous. Well, airplanes — this is the 1990's, you Honor. Back in the twenties, you know, there was bush flying and people — they —

THE COURT: Yeah, but you — you — you compare them with the boats, and I — and I — I've tried to make that distinction. I can find a rational reason why they might not want to have aircraft landing and taking off, because after all, boats aren't going to strike the roof of a house.

MR. CHAIT: Yeah, but these boats are going to crash into each other and cause deaths at a far, far higher rate.

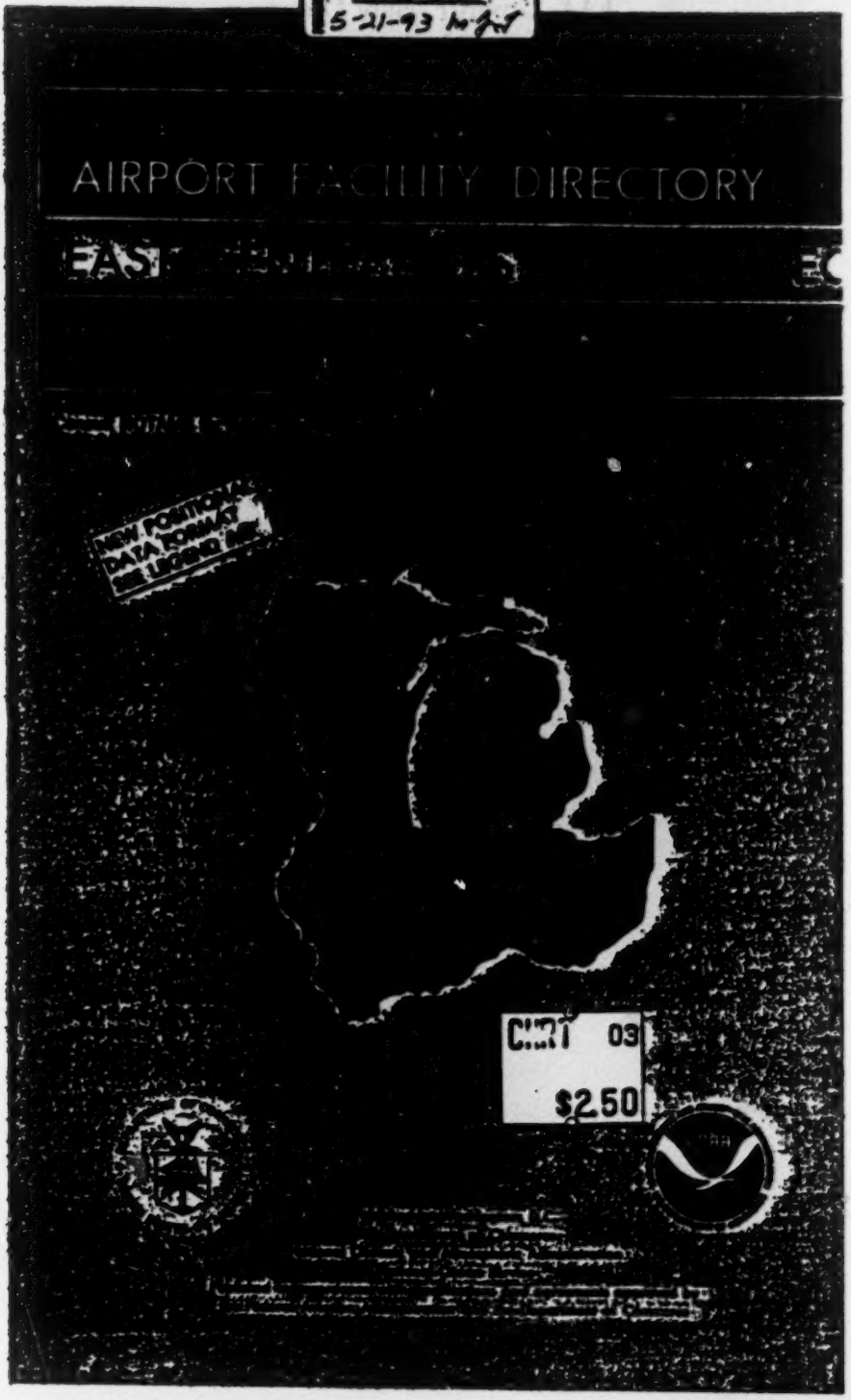
THE COURT: Well — but I think you're just — but I think you're just — you demonstrate by your remarks the fact that — that — that's a disputable point. That's a matter that seems to me is discretionary within the legitimate discretion of the municipality. And similarly with noise. Now you say, well, boats are — are noisier than seaplanes. I suppose that depends on the type of seaplane.

MR. CHAIT: That's correct.

Appendix D

FAA Airport/Facility Directory
Oakland-Pontiac Airport Remarks

DEPOSITION EXHIBIT 2
5-21-93 MGS



BEST AVAIL

PONTIAC

OAKLAND-PONTIAC (PTK) 5 W · UTC-5(-4DT) · N42°39.90' W83°25.08' · [illegible] (23) 220 DETROIT
980 8 S4 FUEL 100LL, JET A OX 1 LRA ARFF Index Ltd. [illegible] B-SS, L-I, 2C, A
RWY 09R-27L: H6200X150 (ASPH-PFC) S-50, D-150, DT-250 HIRL [illegible] IAP
RWY 09R: MALSR. RWY 27L: REIL. VASI(V4L)—GA 3.0°TCH 49'. Trees.
RWY 09L-27R: H3251X75 (ASPH) S-12.5 MIRL [illegible]
RWY 09L: REIL. VASI(V2L)—GA 3.0°TCH 29'. [illegible] RWY 27R: REIL. VASI(V2L)—GA 3.0°TCH 29'.
RWY 04-22: H2451X75 (ASPH) S-12.5 [illegible]
RWY 04: VASI(V2L)—GA 3.75°TCH 37'. Road. — RWY 22: VASI(V2L)—GA 3.75°TCH 48'. Trees.
RWY 18-36: H1856X50 (ASPH) S-12.5 [illegible]
RWY 18: Trees. RWY 36: Hedge.

AIRPORT REMARKS: Attended continuously. Landing fee for acft over 7500 lbs. Arpt CLOSED to air carrier ops with more than 30 passenger seats except PPR call arpt manager 313-666-3900. Birds and deer on and in vicinity of arpt. Seaplane ldgs and takeoffs on Lake Angelus 4.5 miles ENE is prohibited by local ordinance. When twr clsd, HIRL Rwy 09R-27L preset on medium inst, to increase inst Rwy 09R-27L or turn on MIRL Rwy 09L-27R radio req on unicom. ACTIVATE MALSR Rwy 09R—CTAF. Control twr unable to see more than 200' S of Rwy 36 thld. US Customs user fee arpt. For customs clearance 8 hours minimum advance notification required. Pilots must ctc US Customs on 313-226-3140; request for customs svc by FAA flight plan is not accepted. Control Zone effective 1100-0500Z‡. [illegible]
WEATHER DATA SOURCE: LAWRE[illegible]
COMMUNICATIONS: CTAF 120.5 ATIS 125.45 313-666-3621 (1100-0500Z‡) UNICOM 122.95
LANSING FSS (LAN) TF 1-800-WX-BRIEF. NOTAM FILE PTK
PONTIAC RCO 122.15R 111.0T (LANSING FSS)
Ⓓ DETROIT APP/DEP CON 124.9 [illegible]
PONTIAC TOWER 120.5 123.7 (1100-0500Z‡) GND CON 121.9 CLNC DEL 118.25 [illegible]
RADIO AIDS TO NAVIGATION: NOTAM FILE PTK [illegible]
PONTIAC (L) VORTAC 111.0 PSI Chan 47 N42°42.02' W83°31.96' 116°5.5 NM to fld. 1150/3W. ILS 111.1 I-PTK Rwy 09R. Unmonitored when twr clsd. [illegible]

FILE COPY

Appendix E

Wisconsin Statutes @ 30.78

PUBLIC DOMAIN AND THE TRUST FUNDS
CHAPTER 30. NAVIGABLE WATERS, HARBORS AND NAVIGATION
SUBCHAPTER V. REGULATION OF BOATING

Wis. Stat. @ 30.78 (1994)

30.78 Local regulation of seaplanes

(1) City, village and town ordinances. Any city, village or town adjoining or surrounding any waters may, after public hearing, by ordinance:

(a) Prescribe reasonable safety regulations relating to the operation on the surface of such waters of any aircraft capable of landing on water.

(b) Prescribe the areas which may be used as a landing and take-off strip for the aircraft or prohibit the use of the waters altogether.

(c) Provide proper and reasonable penalties for the violation of any such ordinance.

(1g)(a) A public inland lake protection and rehabilitation district, after public hearing, may enact and enforce local ordinances applicable to a lake entirely within its boundaries if each town, village and city having jurisdiction on the lake adopts a resolution authorizing the lake district to do so.

(b) Ordinances authorized under par. (a) are limited to the type of ordinances authorized under sub. (1) (a) to (c).

Appendix F

Vermont Statutes 5 V.S.A. @ 403

TITLE 5 AERONAUTICS AND SURFACE TRANSPORTATION GENERALLY
PART 2. AERONAUTICS
CHAPTER 13. OPERATION OF AIRCRAFT
SUBCHAPTER 1. GENERAL PROVISIONS

5 V.S.A. @ 403 (1995)

403. Lawful and unlawful flight; landing

Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owner, or unless conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without consent, or where there has been no airport, heliport, restricted landing area or seaport established in accordance with the provisions of this title, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the airman shall be liable, as provided in section 479 of this title.

Appendix G

Pennsylvania Statutes 67 Pa. Code @ 471.5

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

SUBPART B. NON-VEHICLE CODE PROVISIONS

ARTICLE IV. AIR TRANSPORTATION

CHAPTER 471. AIRPORT RATING AND LICENSING

67 Pa. Code @ 471.5 (1995)

@ 471.5. Airport rating — excluding heliports.

(a) The following represents rating categories to be used by the Bureau for issuance of an airport license:

(1) Public airport.

(i) Scheduled service. An airport with a paved runway, a runway lighting system, a precision instrument landing system and passenger handling facilities.

(ii) Business. An airport with a paved runway 3,500 feet or greater, a runway lighting system and a precision or nonprecision instrument landing approach.

(iii) General service. An airport with a turf or paved runway with or without an instrument approach.

(iv) Ultralight. A landing area for the use of ultralight aircraft.

(v) Seaplane base. An area of water used as a landing area.

(2) Private airport.

(i) Individual. A private airport used exclusively by the licensee.

(ii) Group. A private airport used exclusively by a partnership, organization or corporation which is restricted to members of that entity.

(iii) Commercial. A private airport from which the licensee can conduct commercial flight operations, excluding flight instruction but including commercial operations such as maintenance, sale of aircraft or parts.

(iv) Ultralight. A landing area for the use of ultralight aircraft.

(v) Seaplane. An area of water used as a landing area.

(b) Use of landing area by another aircraft. A private airport licensee may invite another aircraft to use his landing area if the licensee has thoroughly briefed the invitee as to the peculiarities of the landing area. The invitee's aircraft operational requirements may not exceed the dimensions of the landing area.

Appendix H

Iowa Code @ 462A.30

TITLE XI NATURAL RESOURCES
SUBTITLE 2 LANDS AND WATERS
CHAPTER 462A WATER NAVIGATION REGULATIONS

Iowa Code @ 462A.30 (1995)

462A.30 Aircraft restriction

It is unlawful for any aircraft to make use of the inland lakes of the state, except in the transportation of persons or property between points separated by a distance of thirty miles or more. However, this section does not prohibit the use of such waters by any aircraft in danger or distress or the use of such waters by the operators of private aircraft, not operated for hire. In addition, the commission may, on the recommendation of the state department of transportation, designate certain areas on inland lakes of the state where seaplane flight instruction may be conducted under such conditions as may be adopted by the commission and the state department of transportation.

Appendix I

New Hampshire Statutes, RSA 422.34 VIII

TITLE XXXIX. AERONAUTICS
CHAPTER 422. NEW HAMPSHIRE AERONAUTICS ACT
PROHIBITIONS AND PENALTIES

RSA 422:34 (1995)

422:34. Prohibitions

It shall be unlawful:

* * *

VIII. For any person to operate or authorize the operation of aircraft for compensation or hire from any of the public inland waters or ice areas of the state unless such area is registered with the department. Applications for such registration shall contain such details with respect to the areas from which flights are to be made as the department may from time to time require.

* * *

Appendix J

Connecticut Statutes, CT ST s 25-43

CONNECTICUT GENERAL STATUTES ANNOTATED
TITLE 25. WATER RESOURCES.
FLOOD AND EROSION CONTROL
CHAPTER 474. POLLUTION
PART III. WATER AND ICE SUPPLIES
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Current through End of 1993 Oct.Sp.Sess.

s 25-43. Bathing in and pollution of reservoirs. Aircraft on reservoirs

(a) Any person who bathes or swims in any reservoir from which the inhabitants of any town, city or borough are supplied with water, or in any lake, pond or stream tributary to any distribution reservoir, or in any part of any lake, pond or stream tributary to any storage reservoir, which part is distant less than two miles measured along the flow of water from any part of such storage reservoir, and any person who casts any filthy or impure substance into any such reservoir, whether distribution or storage, or any of its tributaries, or commits any nuisance in or about it or them, shall be fined not more than one hundred dollars or imprisoned not more than six months, or both. For the purposes of this section, a storage reservoir is defined as an artificial impoundment of substantial amounts of water, used or designated for the storage of a public water supply and the release thereof to a distribution reservoir, defined for the purposes of this section as a reservoir from which water is directly released into pipes or pipelines leading to treatment or purification facilities or connected directly with distribution mains of a public water system.

(b) No person, after notice has been posted that any reservoir, lake or pond, or any stream tributary thereto, is used for supplying the inhabitants of a town, city or borough with water, shall wash any animal or clothing or other article therein. No person shall throw any noxious or harmful substance into such reservoir, lake, pond or stream, nor shall any person, after receipt of written notice from the director of health having jurisdiction that the same is detrimental to such water supply, permit any such substance to be placed upon land owned, occupied or controlled by him, so that the same may be carried by rains or freshets into

the water of such reservoir, lake, pond or stream, or allow to be drained any sewage from such land into such water. Any person who violates any provision of this subsection shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

(c) No person shall cause or permit an aircraft, as defined in subdivision (5) of section 15-34, to land upon, take off from or be operated, kept, parked, garaged, stored or otherwise maintained on any distribution or storage reservoir on any watercourse tributary to any such reservoir.

Appendix K

Michigan Statutes, M.C.L.A. 117.3 (j) and (k)

117.3. Mandatory Charter Provisions

Sec. 3. Each city charter shall provide the following:

* * *

(j) **Public peace, health and safety.** For the public peace and health and for the safety of persons and property. In providing for the public peace, health, and safety, a city may expend funds or enter into contracts with a private organization, the federal or state government, a county, village, township, or another city for services considered necessary by the municipal body vested with legislative power. Public peace, health, and safety services may included the operation of child guidance and community mental health clinics, the prevention, counseling, and treatment of developmental disabilities, the prevention of drug abuse, and the counseling and treatment of drug abusers.

(k) **Ordinances, adoption of codes, publication, procedure, inspection.** For adopting, continuing, amending, and repealing the city ordinances and for the publication of each ordinance before it becomes operative. Whether or not provided in its charter, a city may adopt a law, code, or rules which have been promulgated and adopted by an authorized agency of the state pertaining to fire, fire hazards, fire prevention, or fire waste, and a fire prevention code, plumbing code, heating code, electrical code, building code, refrigeration machinery code, piping code, boiler code, boiler operation code, elevator machinery code, or a code pertaining to flammable liquids and gases, as well as to hazardous chemicals, which have been promulgated by this state, or by a department, board, or other agency of this state, or by an organization or association which is organized and conducted for the purpose of developing the code, by reference to the code in an adopting ordinance and without publishing the code in full. The code shall be clearly identified in the ordinance and its purpose shall be published with the adopting ordinance. Printed copies of the code shall be kept in the office of the city clerk, available for inspection by, and distribution to, the public at all times. The publication shall contain a notice stating that a

complete copy of the code is made available to the public at the office of the city clerk in compliance with state law requiring that records of public bodies be made available to the general public.

* * *

Appendix L

Michigan Statutes, M.C.L.A. 125.581, Section (1)

125.581. Regulation and restriction of use of land and structures

Sec. 1. (1) The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations.

Supreme Court, U.S.
FILED
AUG 9 1996
CLERK

No. 95-2054

In The

Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

STEVEN M. CHAIT
Counsel of Record

STEVEN M. CHAIT & ASSOCIATES, P.C.
4309 Westover Court
West Bloomfield, Michigan 48323
(810) 855-8827

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. REPLY TO RESPONDENT'S "STATEMENT OF THE CASE"

A. Failure To Establish Any Rational Relationship To The City's Stated Objectives.

Respondent suggests at page 2 and page 11 that the ordinances were "reaffirmed by resolution" in 1991, and that the intended purpose was to protect the health, safety and welfare of persons and property in the city. However, the 1946 ordinances permitted operation of waterborne aircraft, and the *prohibition* ordinances were not enacted until the early 1970's (Petition App. 7, at page 82). Discovery in this case has shown that the ordinances were established on an *arbitrary, whimsical and capricious, discriminatory* nuisance basis, while permitting much more powerful and noisier water ski boats, etc., to operate on the lake for hours at a time. (Petition App. 5, at 68, 69). Noise, safety and environmental concerns where never taken into account, as testified to by the Mayor and the Chief of Police. (Petition App. 5, at 68, 69). Indeed, the City only passed its resolution stating that "health, safety and welfare of its citizens" was a factor in the seaplane prohibition subsequent to the decision of *Square Lake Hills v. Bloomfield Township,* 437 Mich. 310, 471 N.W.2d 321 (1991), after that case came down utilizing the "health, safety and welfare" language. That case has absolutely nothing to do with aviation, seaplanes, or federal preemption.

B. Regulation v. Total Prohibition.

Further, the *Square Lake case was premised upon regulation of the number of boats permitted on a small lake, not the total prohibition of any type of boats or aircraft.* In this case, the city ordinances prohibiting the operation of aircraft over and upon the surface of the lake is exclusionary. An ordinance which *totally excludes* an otherwise legitimate use carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use. *English v.*

Augusta Township, 204 Mich. App. 33, 514 N.W.2d 172 (1994) (Docket No. 141480, decided March 7, 1994) (See Petition at pages 25, 26).

An appropriate analysis must consider the nature of the significant Constitutional limitations upon local power to strip individuals and the public of their due process and equal protection rights, and the utter failure of the City in this case to support its conclusory allegations that the Ordinances were reasonably related to the achievement of the City's stated objectives, in light of substantial evidence to the contrary.

C. Respondents Have Admitted That The Ordinances Are Based On Aircraft Noise And Danger, Areas Clearly Reserved To The FAA.

At Page 11 of their Brief in Opposition, Respondents state *"Aside from noise regulation, which may be preempted,* the stated public purposes are all rational and reasonable." (Emphasis added) This is a clear admission that this Honorable Court has held that concerns regarding Aircraft Noise and Safety of both persons in the air and on the ground must be expressly reserved to the FAA, to preserve the delicate and uniform balance between convenience, safety, and the nation's need for a useful national airspace and airport system. *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973) (See Petition at Pages 18, 19). The City of Lake Angelus Resolution, which was concocted some 20 years *after* the ordinances went into effect for purely emotional and prejudicial reasons, attempts to justify the *prohibitions* based upon noise, danger (safety), and pollution. The FAA is not required to exercise its full power in order to occupy the field, and a local ordinance predicated in part upon noise reduction must fail. *San Diego Unified Port Authority v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981). Finally, Respondent argues that the potential of Zebra Mussel infestation is a basis for the prohibition. In The Affidavit of expert witness John Schwartz, dated October 18, 1993, and made part of the record below, Mr. Schwartz states his opinion that seaplanes are no more likely to introduce mussels into the lake than are boats. (Reply App. 1) There are no enforcible ordinances requiring boat owners to inspect for

Zebra Mussels at Lake Angelus. Further, Mayor Donald Althoff has testified that no study had ever been conducted to determine whether there were already Zebra Mussels in Lake Angelus, and admitted that there may be some in the lake right now. (Reply App. 2).

II. PETITIONER HAS ACCURATELY STATED THE FACTS AND LAW

A. Petitioner's Statement Of Question II.

The Respondent has stated at page 4 that Question II as framed in the Petition is inaccurate and argumentative. In fact, the Petition contains an entire section which clearly presents record facts and law in full support of the issues presented by Question II, commencing on page 25 of the Petition. It is certainly Petitioner's position that the Circuit Court below erred in its findings in this regard, and that is without question a proper basis upon which to Petition was Honorable Court for Certiorari.

B. The Ordinance Provisions Which Prohibited Flight At Altitudes Below 500 Feet Are Currently At Issue.

Respondent states at page 5 that there is no altitude issue remaining in this case. However, as clearly set forth in the Petition at the time that Petitioner Robert Gustafson filed this action in the District Court below, the city ordinance contained not only a *prohibition* against landing on the surface of the lake, but also a clearly (and subsequently admittedly) *Federally Preempted prohibition against any* aircraft fiying within 500 feet of the surface of Lake Angelus, notwithstanding the fact that the lake underlies the Airport Traffic Area and Control Zone of the FAA Air Traffic Control Tower located at Michigan's second busiest airport. (Petition, page 7). The District Court, the Circuit Court, and the Respondent have now all agreed that the 500 foot prohibition *clearly* is Federally Preempted. Even the passage from the District Court's opinion, cited by Respondent clearly quotes the Court

as stating that "Defendants *seem willing* to give up the altitude restriction, but not the landing portion." At oral argument before the District Court, the City Attorney conceded that there *may* be some problems with the City's theory in defense of the airspace prohibition in light of the Federal Preemption authority cited by Petitioner Robert Gustafson, but argued that the PROHIBITION of seaplanes on the surface should still prevail.

However, the City *never* withdrew its brief in support of the Airspace *Prohibition* or withdrew its position regarding its validity until *SUBSEQUENT* to the issuance of the District Court's opinion and permanent injunction prohibiting the City from enforcing the ordinances against seaplane pilots. Instead, the City simply chose not to include in their appeal to the Sixth Circuit Court of Appeals that portion of the District Court's injunction striking down the altitude *Prohibition.*

Therefore, in the Courts below, Petitioner Robert Gustafson requested Attorney Fees and Costs, since his action was the "catalyst" which caused the defendant City to make significant changes in its past practices, therefore entitling Petitioner to his costs even if no direct relief is obtained. *Americans United for Separation of Church and State v. School District of the City of Grand Rapids,* 835 F.2d 627 (6th Cir. 1983).

The Circuit Court below appears to have misunderstood the fact that the defendant City *did not* voluntarily give up the offending altitude *Prohibition* until after they had lost in the District Court on that issue. (App. 1 footnote 2). Therefore, the altitude restriction is very much at issue in this matter, as Petitioner has pursued his entitlement to his substantial costs and attorney fees.

C. Petitioner Has Not Filed A New Amicus Brief With The Petition.

Petitioner has appended no Briefs of any kind to the Petition which were not fully before the Circuit Court of Appeals below. Indeed, one very relevant and highly significant document which directly contradicts the position of

Respondent was provided to the Circuit Court solely as an exhibit to the Amicus Brief of the Seaplane Pilots Association.

The City of Lake Angelus argued in the courts below and at pages 19 and 20 of their Brief in Opposition that "the FAA itself has recognized that landings may be prohibited by local ordinance, since it has noted the Lake Angelus prohibition in its official publication." (the United States Government Flight Information Publication, Airport/Facility Directory).

D. FAA Position Statements

In direct rebuttal to the allegations by the City regarding the position of the Federal Aviation Administration (FAA) in this case, the *FAA submitted an affidavit specifically stating that their inclusion of the ordinance was not intended as a statement that the ordinance was valid or enforceable.* (Pet. App. 6 at 80, 81) The sole reason that the FAA identified the ordinance to the pilot community was to prevent pilots from being "blindsided" with arrest and prosecution from a surprise, unknown ordinance.

This is extremely relevant information upon review by this Honorable Court. The *FAA has provided both this affidavit and an additional letter* dated November 17, 1994, to the Oregon Office of Legislative Counsel, expressly stating the Agency's position, that a *state may not draft legislation governing seaplane* operations since *uniform regulations governing seaplane operations* throughout the United States are codified at 14 C.F.R. Part 91, section 91.115 of which specifically applies to seaplanes (Pet. at 8, 9, Pet. App. 6).

Contrary to the above Statements of the FAA, the Circuit Court below erroneously determined that the FAA position is completely opposite to the Statements of the FAA on the Record. (Compare Pet. App. 1 at pages 16 through 18 with Pet. App. 6, at pages 77 through 81). *Petitioner renews his suggestion that this Honorable Court Request the FAA to Provide Its True Opinion regarding Seaplane Federal Preemption.*

III. STATE AND LOCAL ORDINANCES WHICH PURPORT TO PROHIBIT AIRCRAFT OPERATIONS ABOVE OR UPON OPEN WATER ARE PREEMPTED BY FEDERAL LAW.

A. The District Court Below Found That Regulations Enacted Pursuant To The Federal Aviation Act, 49 U.S.C. App. Sections 1301-1557, And The Federal Aviation Regulations (FARs) Promulgated Thereunder, Imply That Congress Intended That This Area Be Preempted. (Petition App. 2, At Page 43).

The District Court's conclusion is supported by the express language of the Act and the FARs promulgated thereunder. 49 U.S.C. App. 1508(a) provides that:

> *The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters.* (Emphasis added).

Section 40103(B)(2) of the Act delegates to the FAA the authority to:

> (D.) prevent[ing] collision between aircraft, between aircraft and *WATER VEHICLES*, and between aircraft and airborne objects. (Emphasis added)

Section 40103(b)(1) of the Act states that:

> (a) The Administrator of the Federal Aviation Authority shall develop plans and policy for the use of the *NAVIGABLE AIRSPACE* . . . (Emphasis added)

"*NAVIGABLE AIRSPACE*" is defined as "airspace above the *MINIMUM ALTITUDES* of flight prescribed" by FARs, *and includes the airspace needed to insure safety in take-off and landing of aircraft.* 49 U.S.C. 1301 (29). Pursuant to 49 C.F.R. section 119, there is *NO MINIMUM ALTITUDE OVER OPEN WATER*, which is a major difference and distinction in the way the Federal Aviation Regulations treat land versus open bodies of water. 14 C.F.R. 91.119 provides an express exception to minimum altitudes when aircraft are operated over open water:

> Minimum safe altitudes: General
>
> *Except when necessary for takeoff or landing,* no person shall operate an aircraft below the following altitudes:

. . .

(c) Over other than congested areas. An altitude of 500 feet above the surface, *except over open water* or sparsely populated areas. *In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle or structure.* (Emphasis added).

Section 91.115 specifically regulates the operation of aircraft on the surface of the water. 14 C.F.R. 91.115. (See Petition App. 2, at page 46)

These FARs do not state that the activity is subject to local constraint. As the District Court summarized:

> The FAA provides safety regulations for take-offs, landings, and operations on water, as well as allowable altitudes. The purpose of the City ordinance, taken as a whole, is to prohibit seaplane operations of any kind on the lake or up to 500 feet above the city. This is clearly contrary to the FAA regulations and federal statutes, and thus, the ordinances are preempted. (Petition App. 2, at page 47)

In support of its conclusion, the District Court observed that subsequent courts have followed the Supreme Court's guidance in *City of Burbank* to find federal preemption in a variety of local ordinances, including those which purport to restrict or prohibit use of navigable airspace under the guise of noise abatement measures. (Petition App. 2 at pages 44 and 45).

B. The District Court Properly Found That LOCAL LAND USE REGULATIONS Are NOT Involved In This Case.

Respondent argues at pages 14 through 18 of the Brief in Opposition that the Federal Aviation Act was not intended to preempt local land use planning.

Respondent cites at page 17 the case of *Faux-Burhans v. County Comm'rs,* 674 F. Supp. 1172 (D. Md. 1987), aff'd without opinion, 859 F.2d 149 (4th Cir. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 869, 102 L. Ed. 2d 992 (1989), for the proposition that no federal law gives a citizen the right to operate an airport free of local zoning control. The Circuit Court analogized to this case.

However, the District Court *expressly distinguished* the *Faux-Burhans* case from the instant case:

> Defendants also cite Blue Sky and Faux-Burhans v. County Comm'rs . . . As already noted, however, the court in Blue Sky invalidated several local ordinances because they were preempted by FAA regulations. *Faux-Burhans is also inapplicable because that case involved land use regulations governing the development of land in the construction of an airport. It did not involve ordinances that directly regulated aircraft flight operations as this case does.* (Emphasis added).
>
> (Petition App. 2, at page 47)

The line of cases cited by Respondent simply has no bearing, especially in a case where the lake is already being used for recreational boating, waterskiing, and other similar uses which are noisier and of longer duration than the 85 horsepower Piper Cub Seaplane at issue. *See, e.g.,* Inland Lake and Streams Act, Mich. Comp. Laws Ann. 281.951, *et seq.;* Mich Comp. Laws Ann. 281.1114 (noise levels of 90 decibels or less are acceptable). Compare, *United States v. County of Westchester,* 571 F. Supp. 786 (S.D.N.Y. 1983) (90% of general aviation fleet has a noise level of 76 decibels or less).

Under this factual scenario, there is simply no local zoning plan for land use which would be affected by the occasional operation of a seaplane.

C. Respondent Has Admitted That 14 C.F.R. Part 157 Is Unrelated To The Issues In This Case.

The Circuit Court below stated:

> We believe it is appropriate to find that the landing of a seaplane on a lake, not officially designated as a landing area, is tantamount to, and can be reasonably construed as, the creation of an airport. Under FAA regulations, the broad definition of airport includes seaplane bases. 14 C.F.R. 157.2 (Petition App. 1, at page 19)

The Circuit Court believed it would be necessary for part 157 airport requirements to be complied with, and that was a basis for its finding of no Federal Preemption.

Respondent correctly points out at page 19 of the Brief in Opposition that *14 C.F.R. Part 157 HAS NO APPLICATION TO, AND SPECIFICALLY EXEMPTS, THE VERY TYPE OF "LANDING AREA" CREATED BY A SEAPLANE'S PRESENCE.* (See Petition App. 10) *The practical result is a conflict between a local ordinance and the FARs at the moment the seaplane touches the water.*

D. The Circuit Court Concluded That The FAA Has Sole Control Of Aircraft Operations Once The Airport Has Been Established.

The Circuit Court states:

> " . . . once an airport is operating, it may be that only the FAA can regulate the resulting noise problem . . . " (Petition App. 1, at page 29)

The Court also cites the case of *Price v. Charter Township of Fenton,* 1995 WL 738386 (E.D. Mich. Nov. 30, 1995) for the proposition that once a landing area is operating, the FAA preempts local ordinances. *HOWEVER, THE CIRCUIT COURT FAILS TO ADDRESS THE PREEXISTING USE OF LAKE ANGELUS BY SEAPLANES REFLECTED IN THE RECORD.* (Petition App. 7, at Page 82).

IV. STATE AVIATION ISSUES

A. Seaplane Cases Cited By Respondent.

Respondent cites a number of cases regarding seaplane prohibitions at pages 21 and 22 of the Brief in Response. The Case of *Christianson v. Hauptman,* 991 F.2d 59 (2nd Cir. 1993) has no relevance since it relates only to regulations of a Federal Agency, The National Park Service. It has nothing to do with state or local regulation.

Georgia Power Company v. Baker, 830 F.2d 163 (11th Cir. 1987) was a case which involved private property, had nothing to do with any Federal Preemption issues, and in which a seaplane commercial flight school was at issue, unlike the instant case.

The District Court below did not find persuasive *City of Shreveport v. Conrad,* 212 La. 737, 33 So. 2d 503 (1947), nor

People v. Altman, 304 N.Y.S. 2d 534 (N.Y. Sup. Ct. 1969). *City of Shreveport* is an early state court case in which a municipal ordinance prohibiting seaplane landings was upheld. As the District Court pointed out, *City of Shreveport* did not even address the preemption issue, was decided before *City of Burbank*, and before the Federal Aviation Act became law. Similarly, *Altman* was properly distinguished by the District Court on the grounds that the local ordinance was in harmony with the federal statute, was decided before *City of Burbank*, and the court did not address the FAA regulations at issue in this case.

Neither of the other two state court cases cited by Respondent have anything to do with Federal Preemption issues, and are apparently cited solely because a seaplane was factually involved.

B. The State Of Michigan Has Taken The Position That *No* Seaplane Prohibition Should Exist At Lake Angelus.

The sole objective analysis undertaken at the City of Lake Angelus' request was a review of the lake by James Greshel, Administrator, Safety & Services Division of the Michigan Bureau of Aeronautics. The City had requested that the State Bureau of Aeronautics itself prohibit seaplane operations on Lake Angelus. Mr. Greshel refused to prohibit seaplanes, and saw no factor which would prevent aircraft safely taking off or landing on Lake Angelus. He stated *"[T]here is no significant aviation safety or airspace basis to exclude seaplanes from Lake Angelus."* (Petition App. 9, at pages 88, 89).

V. CONCLUSION

For all of the reasons stated, Petitioner, Robert Gustafson, prays that this Honorable Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

STEVEN M. CHAIT & ASSOCIATES, P.C.
STEVEN M. CHAIT

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT GUSTAFSON, Lake Angelus Riparian Property Owner,

Plaintiff,

-vs-

CITY OF LAKE ANGELUS, DONALD ALTHOFF, MAYOR OF THE CITY OF LAKE ANGELUS, MICHAEL STEFANI, CHIEF OF LAKE ANGELUS POLICE FORCE,

Defendants.

Case No:
92 CV 73976 DT
Hon. Paul V. Gadola

(Filed Dec. 27, 1993)

STEVEN M. CHAIT P33747
Attorney for Plaintiff
1000 Maccabees Center
25800 Northwestern Highway
P.O. Box 222
Southfield, MI 48037-0222
(313) 746-000700

JAMES L. HOWLETT P15187
JOHN D. STARAN P35649
Attorneys for Defendant
200 E. Long Lake Road, Ste. 110
Bloomfield Hills, MI 48304
(313) 645-9400

SUPPLEMENTAL AFFIDAVIT OF JOHN SCHWARTZ

State of Michigan)
) SS
County of Oakland)

JOHN SCHWARTZ, being first duly sworn, deposes and states the following:

1. I work at Michigan State University as Program Leader for the Sea Grant College Program, which is a program that does research on the Great Lakes, and further provides extension outreach assistance to local communities.

2. That in my opinion, seaplane operators who utilize the same type of inspection and cleaning procedures on their seaplanes as are recommended for use on boats, would not be any more likely to introduce Zebra Mussels into Lake Angelus, than the presently permitted watercraft.

3. That in my opinion, the operator of a seaplane can perform the same type of preventative Zebra Mussel inspections and cleaning as the operator of the currently permitted watercraft on Lake Angelus, by landing their amphibious seaplanes at an airport to perform those inspections and cleaning prior to landing on Lake Angelus, or by simply restricting takeoffs and landings in non-amphibious seaplanes to Lake Angelus.

4. That in my opinion, I concur with the Michigan Department of Natural Resources that inevitably, all Michigan inland lakes are likely to become infested with Zebra Mussels, although this period of time may be decades.

5. I make this Affidavit on personal knowledge, and if sworn as a witness, I can testify competently to the facts stated herein.

Further deponent saith not.

/s/ John Schwartz
JOHN SCHWARTZ

Subscribed and sworn to before me
this 18th day of October , 1993.

/s/ Regina S. Bush
NOTARY PUBLIC

Ingram County, Michigan
My commission expires: Jan. 27, 1996

REGINA S. BUSH
Notary Public, Clinton County, MI
Acting in Ingham County, Michigan
My Comm. Expires Jan. 27, 1996

APPENDIX II

RECEIVED
MAY 10 1994
LEONARD GREEN, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT GUSTAFSON, LAKE ANGELUS RIPARIAN PROPERTY OWNER,

Plaintiff,

No. 92-CV-73976-DT
(Filed Dec. 27, 1993)

vs

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor OF THE CITY OF LAKE ANGELUS; MICHAEL STEFANI, CHIEF OF LAKE ANGELUS POLICE FORCE,

Defendants.
_____/

The Deposition of DONALD ALTHOFF taken before Harvey A. Kahn, Court Reporter and Notary Public, in and for the County of Oakland, State of Michigan, at 25800 Northwestern Highway, Southfield, Michigan, on Monday, July 19, 1993, at about 10:15 a.m.

APPEARANCES:

STEVEN M. CHAIT, ESQ.
25800 Northwestern Highway
Suite 1000
Southfield, Michigan 48075
Appearing on behalf of Plaintiff

JAMES HOWLETT, ESQ.
200 East Long lake Road
Suite 110
Bloomfield Hills, MI 48304-2361
Appearing on behalf of Defendants

REPORTED BY:
HARVEY A. KAHN
A & M Court Reporting
P. O. Box 250455
West Bloomfield, Mi 48325-0455
(313) 661-2800

* * *

[p. 24] specifically relating to zebra mussels?

A No, to the best of my knowledge, no.

Q Have any studies been done by the City of Lake Angelus to determine whether zebra mussels exist in the lake?

A Specific as to that exposure, no.

Q Do you have any evidence, as we sit here today, that anyone has ever observed any zebra mussels in Lake Angelus?

A No specific knowledge.

Q Do you have any specific knowledge as to whether anyone has expressed an opinion whether there are or are not zebra mussels currently in Lake Angelus?

A I have no knowledge of it, no.

Q So, there might be, there might not be?

A Correct.

Q What specific procedures, if any, does Lake Angelus utilize to prevent the introduction of zebra mussels from boats?

A We communicated to the residents that if their individual boats were taken to other lakes, that before they were brought back on to Lake Angelus, the boats would be closely inspected and thoroughly washed before they were put back into Lake Angelus. [p. 25] We have requested that lake residents limit or restrict relatives and nonresidents from bringing their boats on to Lake Angelus. It's basically been a program of education in requesting that the residents be very cautious in this area.

Q So, these are in the nature of requests and not enforceable ordinances, is that correct?

A That's my understanding of it, yes.

Q Does the Police Department, or anyone else from Lake Angelus, go out and inspect someone else's boat before they reinsert it in the lake?

A For zebra mussels?

Q Yes.

A No.

Q Is that request restricting relatives and nonresidents from bringing their boats, is that just a request, or is that an enforceable ordinance?

A I wouldn't want to give a legal opinion on it. There is some wording in an ordinance, but I can't speak to the specific wording of the ordinance.

Q If a resident does have a relative that comes over with a boat and the resident launches it from that resident's property, is there anything currently that would be done by the City to stop that practice, or

* * *

(3)

Supreme Court, U.S.
FILED
SEP 25 1996
CLERK

No. 95-2054

In The

Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF

STEVEN M. CHAIT
Counsel of Record

STEVEN M. CHAIT & ASSOCIATES, P.C.
4309 Westover Court
West Bloomfield, Michigan 48323
(810) 855-8827

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER, ROBERT GUSTAFSON

This SUPPLEMENTAL BRIEF is provided pursuant to United States Supreme Court Rule 15.8, which permits the filing of a Supplemental Brief and new Exhibits, at any time prior to the Court taking action upon the Petition for Certiorari, when relevant new legislation becomes available which did not exist at the time of the party's last filing.

I. THE STATE OF MICHIGAN HAS NOW FURTHER PREEMPTED THE LAKE ANGELUS SEAPLANE ORDINANCES THROUGH RECENT CHANGES TO THE MICHIGAN AERONAUTICS CODE.

In its Opinion, The Circuit Court below states:

> Plaintiff also argues that the ordinances are preempted by state law, relying on Mich. Comp. Laws Ann. 281.1017 and the Michigan Aeronautics Code, Mich. Comp. Laws Ann. 259.1 *et seq.* We disagree. There is nothing in these provisions to indicate the legislature's intent to take over a municipalities' responsibilities in the area of land or water use, development, or the location of aeronautical landing sites. (Petition App. 1, at page 26).

On or about August 6, 1996, the State of Michigan enacted revisions to the Aeronautics Code Of The State Of Michigan, specifically Mich. Comp. Laws Ann. 259.51.(1), which has now been revised in part as follows:

> "The [Michigan Aeronautics] commission has general supervision over aeronautics within this state, with ***EXCLUSIVE AUTHORITY*** to

> approve the operation of airports, **landing fields,** and other aeronautical facilities within the state, so as to assure a uniformity in regulations covering aeronautics . . . " (Emphasis added). (MCLA 259.51(1), Supplemental Brief App. 1).

Section 259.21, as amended states that a **"Landing Field"** means any location, either on land or ***on water,*** that is used for the landing or take-off of aircraft. (Emphasis added). (MCLA 259.21, Supplemental Brief App. 1).

Prior to the August 6, 1996 revision, the Statute, MCLA 259.51(1) DID NOT include the language " . . . with exclusive authority to approve the operation of airports, landing fields, and other aeronautical facilities within the state, so as to assure a uniformity in regulations covering aeronautics . . . " With this new language, the Michigan State Legislature has now made clear that the Central State Agency with the unique expertise in Aviation matters, the **Michigan Aeronautics Commission,** now has the EXCLUSIVE AUTHORITY over local municipalities such as the Respondent City of Lake Angelus, to determine what Aviation Use may be permitted on the surface of Lake Angelus.

As previously set forth in both the Petition and in the Reply Brief, the City of Lake Angelus had requested that the Michigan Bureau of Aeronautics, a division of the Michigan Aeronautics Commission, itself prohibit seaplane operations on Lake Angelus. Mr. James Greshel, Administrator, Safety and Services Division of the Michigan Bureau of Aeronautics, personally investigated this request. Mr. Greshel refused to prohibit seaplanes from

the surface of Lake Angelus, and saw no factor which would prevent aircraft from safely taking off or landing on Lake Angelus. He stated *"[T]here is no significant aviation safety or airspace basis to exclude seaplanes from Lake Angelus."* (Petition App. 9, at pages 88, 89).

Petitioner realizes that this new Michigan statute may well limit the ruling of the Circuit Court below. Since the issue of the new Michigan statute could not have been raised in the Courts below (since it did not then exist), Petitioner is not at this time requesting that the Supreme Court rule on its effect upon this case, but merely feels obligated, in the spirit of candor, to advise the Court of this legislation which has never been considered herein. The new legislation does not in any way detract from the issues of Federal Preemption, nor the worthiness of this case as a candidate for a granting of Certiorari.

II. CONCLUSION

For all of the reasons stated, Petitioner, Robert Gustafson, prays that this Honorable Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

STEVEN M. CHAIT & ASSOCIATES, P.C.

STEVEN M. CHAIT

APPENDIX

AERONAUTICS CODE OF THE STATE OF MICHIGAN ACT 327 OF 1945

Revised: August 6, 1996

259.21 "Landing field" defined.

Sec. 21. "Landing field" means any location, either on land or water, that is used for the landing or take-off of aircraft.

History: 1945, Act 327, Imd. Eff. May 28, 1945; – CL1948, 259.21; – Am. 1996, Act 370, Imd. Eff. July 3, 1996.

Former law: See section 1 of Act 177 of 1929, being CL 1929, § 4801; Act 53 of 1931; and Act 264 of 1939.

* * *

CHAPTER IV.

GENERAL POWERS AND DUTIES OF AERONAUTICS COMMISSION AND DIRECTOR OF AERONAUTICS.

259.51. Aeronautics commission; powers and duties generally.

Sec. 51. (1) The commission has general supervision over aeronautics within this state, with exclusive authority to approve the operation of airports, landing fields, and other aeronautical facilities within the state, so as to assure a uniformity in regulations covering aeronautics. The commission shall encourage, foster, and participate with and provide grants to the political subdivisions of this state in the development of aeronautics within this state. The commission shall establish and encourage the

establishment of airports, landing fields, and other aeronautical facilities. The commission shall promulgate rules that it considers necessary and advisable for the public safety governing the designing, laying out, location, building, equipping, and operation of airports and landing fields. In order to implement this act, the commission may establish programs of state financial assistance in the form of grants, leases, loans, and purchases, or a combination of grants, leases, loans, and purchases, for assisting political subdivisions or other persons. The commission shall not grant an exclusive right for the use of an aeronautical facility. The commission may by the issuance of appropriate and effective rules register pilot's certificates issued by the civil aeronautics authority or other similar federal authority to resident pilots of the state for which it may charge a fee not to exceed $5.00; govern and regulate commercial operations in intrastate commerce for which it may charge a fee of not more than $25.00; and provide for the licensing of aircraft dealers for which it may charge a fee of not more than $25.00.

* * *